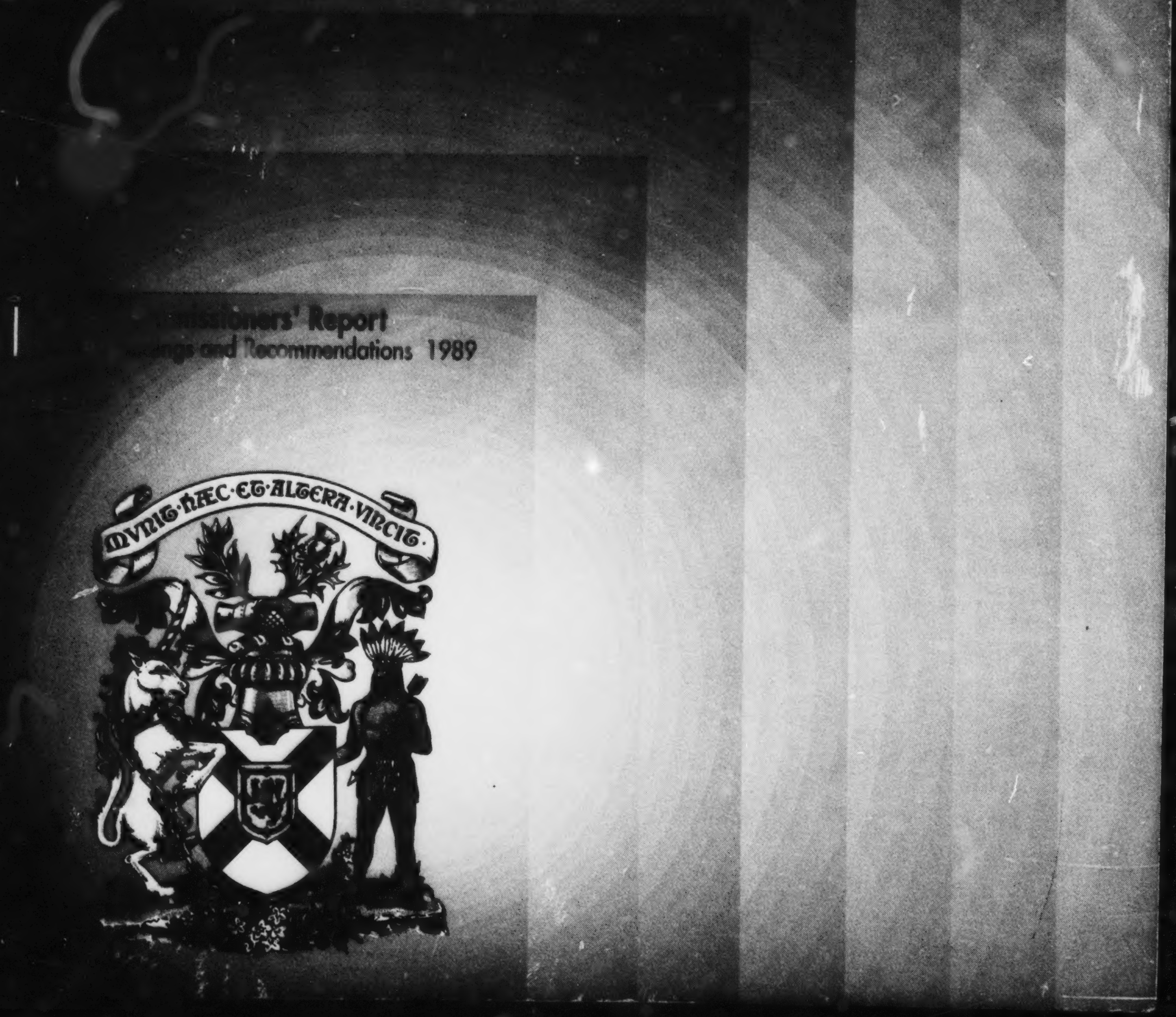
Royal Commission on the Donald Marshall, Jr., Prosecution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Royal Commission on the Donald Marshall, Jr., Prosecution

Volume I: Findings and Recommendations

Chief Justice T. Alexander Hickman
Chairman

Associate Chief Justice Lawrence A. Poitras
Commissioner

The Honourable Mr. Gregory T. Evans, Q.C.
Commissioner

December, 1989

THE ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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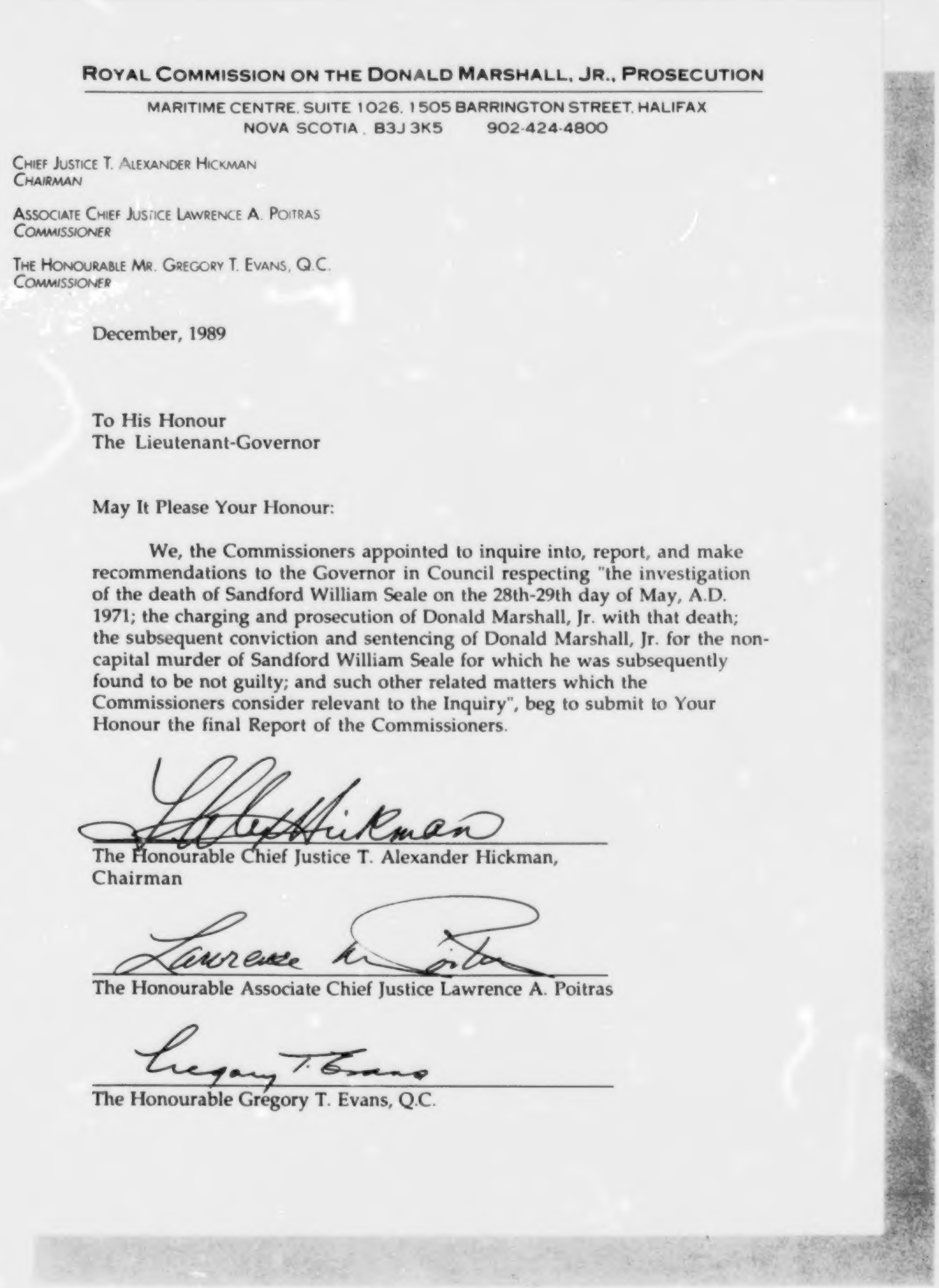


ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

MARITIME CENTRE, SUITE 1026, 1505 BARRINGTON STREET, HALIFAX
NOVA SCOTIA, B3J 3K5 902-424-4800

CHIEF JUSTICE T. ALEXANDER HICKMAN
CHAIRMAN

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS
COMMISSIONER

THE HONOURABLE MR. GREGORY T. EVANS, Q.C.
COMMISSIONER

December, 1989

To His Honour
The Lieutenant-Governor

May It Please Your Honour:

We, the Commissioners appointed to inquire into, report, and make recommendations to the Governor in Council respecting "the investigation of the death of Sandford William Seale on the 28th-29th day of May, A.D. 1971; the charging and prosecution of Donald Marshall, Jr. with that death; the subsequent conviction and sentencing of Donald Marshall, Jr. for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry", beg to submit to Your Honour the final Report of the Commissioners.

T. Alex Hickman

The Honourable Chief Justice T. Alexander Hickman,
Chairman

Lawrence A. Poitras

The Honourable Associate Chief Justice Lawrence A. Poitras

Gregory T. Evans

The Honourable Gregory T. Evans, Q.C.

Acknowledgements

As Chairman of this Royal Commission, I would like to acknowledge the efforts of the staff of the Commission, without whom this work would not have been possible.

It should be noted that most witnesses appeared before the Commission voluntarily, without subpoenas, and we thank them for their cooperation.

Finally, the Commissioners wish to acknowledge the cooperation of the Government of Nova Scotia which, through its various departments directly involved in the work of the Commission, had to respond to numerous requests for information and access to personnel.

Chief Justice T. Alexander Hickman
Chairman
December, 1989

Foreword

When Donald Marshall, Jr. was convicted and sentenced to life in prison in 1971 for murdering Sandford William Seale, most observers of the day probably assumed that it was a "routine" murder case, thoroughly investigated, conscientiously prosecuted and fairly adjudicated by the appropriate authorities in the criminal justice system.

The evidence seemed compelling enough. According to apparently independent "eyewitnesses", two young men got into an argument in a Sydney park one night. One stabbed the other. He died. The "eyewitnesses" identified Marshall as the assailant and Seale as the victim. Little wonder it took a jury less than four hours to find Donald Marshall, Jr. guilty of murder.

But despite all those seemingly reasonable assumptions, the reality, as we now know, is that Donald Marshall, Jr. did not murder Sandy Seale. He spent 11 years in prison for a crime he did not commit.

What went wrong? Did certain specific individuals and institutions within the criminal justice system fail to perform their duties properly? Or did Marshall himself fail to take some action or other that would have made his innocence apparent? Or did the system itself fail? What action should be taken now to make sure that what happened to Donald Marshall, Jr. does not happen to someone else in the future?

The Executive Council of Nova Scotia established this Royal Commission by Order in Council on October 28, 1986 with instructions to:

> ...make recommendations to the Governor in Council respecting the investigation of the death of Sandford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr. with that death; the subsequent conviction and sentencing of Donald Marshall, Jr. for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry.

In order to fulfill that mandate, this Royal Commission first had to determine the facts of the matter. What really happened in Wentworth Park in Sydney on the night of May 28, 1971? How did the initial police investigation of the murder affect subsequent events in the case? How - and how well - did the judge, the Crown prosecutor and the defence counsel carry out their duties during Marshall's trial? Why did young witnesses perjure themselves on the witness stand? Why did various police reinvestigations and reviews of the case following Marshall's original conviction fail to uncover the truth of what had happened? Was the Supreme Court of Nova Scotia (Appeal Division) correct in choosing to blame Marshall for what had happened to him, even after finding that he was not guilty of murdering Sandy Seale? Was the process by which Marshall was granted compensation for his wrongful conviction and imprisonment fair and reasonable?

Simply determining what happened in this particular case, however, could not provide an adequate basis of information for making recommendations to prevent such tragedies from occurring again. As the Chairman said in his statement at the opening of the public hearings on September 9, 1987:

> In order to develop meaningful recommendations all contributing factors must be carefully and critically examined in the context of the current state of the administration of justice in Nova Scotia. ...We will also examine, among other things, the role of the Attorney General as a member of Cabinet, the relationship of Crown prosecutors with defence counsel and with the police, as well as related matters. In addition ... we intend to give consideration to the allegations that minorities of this province are not treated equitably by the justice system. It is our ultimate aim to make recommendations which will ensure that the unfortunate events surrounding Mr. Marshall will not be repeated; to do this we must satisfy ourselves that the present state of the administration of criminal justice in Nova Scotia is sound. We will not avoid a discussion of these issues.

In January 1987, the Royal Commission placed advertisements in newspapers in Nova Scotia and in the *Royal Gazette* inviting any interested group or individual who wished to participate in the public hearings and/or other aspects of the work of the Commission to apply for "standing".

The Commission defined two classes of standing - full standing, which gave groups or individuals the right to cross-examine witnesses, make submissions to the Commission and participate fully in the hearings; and observer status, which entitled the party to be present at the hearings, have questions directed at witnesses by Commission counsel, and file a written submission to the Commission.

The Police Association of Nova Scotia and the Canadian Bar Association (Nova Scotia Branch) were granted observer status. Full standing was granted to Donald Marshall, Jr., Sandy Seale's father Oscar Seale, former Sydney police detectives John MacIntyre and William Urquhart, the estate of former Sydney City Crown prosecutor Donald C. MacNeil, Q.C., the Department of Attorney General, the Royal Canadian Mounted Police, RCMP officers Evers, Green, McAlpine, Davies, Wheaton, Carroll and Scott, the Black United Front and the Union of Nova Scotia Indians.

In May 1987, the Commission heard submissions from some of those to whom we had granted standing. They believed that their ability to participate in the process could be rendered meaningless because they could not afford to have legal counsel represent them at the proceedings. The Commission recommended that public funding be provided to pay for legal counsel for John MacIntyre, William Urquhart, the Union of Nova Scotia Indians, the Black United Front, Oscar Seale and the estate of Donald C. MacNeil. The Government of Nova Scotia, which had already previously agreed to pay for legal representation for Donald Marshall, Jr., accepted this recommendation.

The first phase of the Commission's public hearings began in Sydney in September 1987. Over the course of 36 sitting days, 62 witnesses testified about events from the time of Sandy Seale's murder to the first reinvestigation of the case by the RCMP in 1971. In January 1988, the hearings moved to Halifax where the focus shifted to an examination of the events leading up to and following Marshall's acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983.

Although we had hoped to question the judges of the Court of Appeal about certain aspects of their decision, the judges declined to testify on the ground of judicial immunity. The courts upheld their refusal to testify. As a result, our comments concerning the Court of Appeal's decision are based on the information available from the court records and the letter of transmittal.

During 53 days of public hearings in Halifax, the Commission also heard evidence designed to help us compare the justice system's handling of the Marshall case with its handling of a number of other cases involving prominent public figures. The Halifax phase of the public hearing process ended in September 1988 after hearing from 52 witnesses, including Donald Marshall, Jr.

Although the public hearings produced 16,390 pages of transcript evidence and resulted in the introduction of 176 exhibits, the Commission recognized that some complex issues - racism, the role of the Attorney General, the relationship of the Crown prosecutor to the police and to defence counsel - simply could not be adequately addressed through a public hearing process.

To provide us with the necessary background to help formulate our recommendations in such areas, the Royal Commission funded a number of independent research projects and also organized a special consultative forum to examine some of these specific issues.

In November 1988, we brought together experts in the fields of Native rights, racism, and the role of the Crown prosecutor for two-and-one-half days of panels and discussions. This forum, which provided us with the opportunity to hear these complex issues discussed and debated by experts representing a number of different perspectives, was especially useful in our consideration of these issues. An edited transcript of the proceedings of the Consultation is published as Volume 7 of this Report.

We also commissioned five separate research projects on specific issues, including discrimination against Blacks and Natives in the criminal justice system, and the respective roles of the police, the Crown prosecutor and the Attorney General within the justice system. These reports, which were prepared by experts in their fields and were subject to peer review and consultation, also helped inform our consideration of these important issues. The complete reports of the researchers are published as Volumes 2 to 6 of this Report.

Volume 1 of this Report represents the conclusions and recommendations of this Royal Commission. Volume 1 is divided into two parts. In Part 1, we focus on what actually happened, chronologically, from the 1971 incident in Wentworth Park through Marshall's 1983 acquittal, to the agreement to compensate him for his wrongful imprisonment, the eventual conviction of Roy Ebsary for the murder and, finally, the appointment of this Royal Commission. In Part 2, we focus on some of the broader issues that emerge from the findings of fact we made in Part 1, examining the way in which the criminal justice system operated in 1971, how it operates today and how it should operate in the future.

Our purpose as Commissioners has not been simply to point out what went wrong in the Donald Marshall, Jr. case. Having identified how the system and individuals in it failed in this particular case, we have proposed changes we believe will make such a miscarriage far less likely to occur in the future.

While we know it is impossible to guarantee that there will never be another miscarriage of justice such as the one that occurred to Donald Marshall, Jr., we believe it is imperative that responsible authorities do everything humanly possible to reduce or eliminate such possibilities. It is in that spirit that we offer this Report.

Part 1
Factual Findings

1.1 Introduction

We find:

- that the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to - and even beyond - his acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983.
- that this miscarriage of justice could have and should have been prevented if persons involved in the criminal justice system had carried out their duties in a professional and/or competent manner.
- that Marshall was not the author of his own misfortune.
- that the miscarriage of justice was real and not simply apparent.
- that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment.

On May 28, 1971, four people came together in a brief, unplanned nighttime encounter in Wentworth Park in Sydney, Nova Scotia. One of them, a 17-year-old black youth named Sandford (Sandy) William Seale, was killed. Another, a 17-year-old Micmac Indian named Donald Marshall, Jr., was wrongfully convicted of his murder, and was sentenced to life imprisonment in November 1971. Eleven years later, after Marshall's lawyer, Stephen Aronson, brought forward information suggesting Marshall did not commit the murder, the RCMP reinvestigated the case for a second time. After that investigation confirmed that Marshall did not kill Seale, he was released on parole and subsequently acquitted by the Supreme Court of Nova Scotia (Appeal Division) in May 1983. A third man, Roy Newman Ebsary, who was one of the four people who had come together in Wentworth Park that night, was charged with killing Seale and was convicted of manslaughter following three trials. He was sentenced to three years in prison. In 1986, the Court of Appeal reduced his sentence to one year. He died in 1988.

The events that took place in Wentworth Park in those few moments on that spring night in 1971 have spawned numerous official inquiries and proceedings, including three formal police investigations, two preliminary inquiries, four trials, three appeals to the Supreme Court of Nova Scotia (Appeal Division), a Reference to the Court of Appeal and two Royal Commissions, including this one. The cost in dollars has been tremendous. The toll in human anguish has been incalculable.

The principal task of this Royal Commission has been to determine why Donald Marshall, Jr. was wrongfully convicted and to make recommendations to ensure that such a miscarriage of justice does not happen again.

First, what did go wrong? Although we will examine in detail each of the relevant events of the Marshall case from its beginning on May 28, 1971, to our appointment on October 28, 1986, we can begin with the following general conclusions that flow from our consideration of all of the evidence.

The criminal justice system failed Donald Marshall, Jr. at virtually every turn, from his arrest and wrongful conviction in 1971 up to - and even beyond - his acquittal by the Court of Appeal in 1983. The tragedy of this failure is compounded by the evidence that this miscarriage of justice could have - and should have - been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner.

If, for example, the Sergeant of Detectives of the Sydney City Police Department had not prematurely concluded - on the basis of no supporting evidence and in the face of compelling contradictory evidence - that Donald Marshall, Jr. was responsible for the death of Sandy Seale, Marshall would almost certainly never have been charged with the crime. If the Crown prosecutor had provided full disclosure to Marshall's lawyers of the conflicting statements provided by alleged eyewitnesses; if Marshall's lawyers had conducted a more thorough defence, including pressing for such disclosure and conducting their own investigations into the killing; if the judge in the case had not made critical errors in law; Marshall would almost certainly not have been convicted.

Even after he was convicted and sent to prison, however, there were numerous other occasions when this miscarriage of justice should have been discovered and rectified, but was not.

For example, when the Crown received evidence shortly after Marshall's conviction suggesting Roy Ebsary might have been involved in the killing, it did not disclose this information to Marshall's counsel. When the RCMP reinvestigated the murder as a result of that new evidence, it did so in such an entirely inadequate and unprofessional manner that it prevented his wrongful conviction from being discovered. During Marshall's appeal of his conviction, his lawyers failed to identify and argue critical errors of law which occurred during the trial. Similarly, the Court of Appeal failed to identify these errors.

When Marshall's wrongful conviction was finally discovered in the early 1980s, the Court of Appeal compounded the miscarriage of justice by describing Marshall as having contributed in large measure to his own conviction and by stating that any miscarriage of justice in the case was more apparent than real.

This Commission has concluded that Donald Marshall, Jr. was not to blame for his own conviction and that the miscarriage of justice against him was real.

That is the inescapable, and inescapably distressing, conclusion we have reached after listening to 113 witnesses during 93 days of public hearings in Halifax and Sydney in 1987 and 1988 and after sifting through 176 exhibits submitted in evidence during those hearings.

But concluding that Donald Marshall, Jr. was the victim of a miscarriage of justice does not answer the complex question of why Marshall came to be wrongfully convicted and imprisoned in the first place. Was it because he was a Native? Was it because he was poor?

To answer those admittedly difficult questions, this Commission has looked not only at how the criminal justice system in Nova Scotia operated in the Marshall case, but it has also compared the handling of the Marshall case with the way in which the system dealt with cases involving powerful and prominent public officials. At the same time, we commissioned independent research studies to find out how Natives and Blacks are treated in the criminal justice system.

From all of that, the evidence is once again persuasive and the conclusion inescapable that Donald Marshall, Jr. was convicted and sent to prison, in part at least, because he was a Native person. We will look at these issues in more detail in our section on visible minorities in the justice system later in this volume.

Having reached these conclusions, we take the next logical step in fulfilling our mandate and ask what can and should be done to make sure that the criminal justice system lives up to its promise of equal justice for all? That too is a question we will deal with later in this volume of our Report.

There are certain issues, however, that we will not be addressing in our Report. For example, this Royal Commission is not recommending that criminal charges be laid against any specific individuals arising out of the findings of fact we will make. Although some counsel urged us to do so during their final arguments to the Royal Commission, it is our opinion that a decision on whether or not any charges should be laid is one that should be taken by the appropriate authorities after due consideration of all relevant factors. We agree with the sentiments expressed by the Attorney General of Ontario when establishing the Grange Commission, sentiments which were concurred in by the Ontario Court of Appeal in *Re Nelles et al. and Grange et al.* (1984), 9 D.L.R.(4th) 79 at p. 84:

> The purpose of a public inquiry is not to attach criminal culpability. It is not a forum to put individuals on trial. The just and proper place to make and defend allegations of crime or civil liability is in a court of law.
>
> In this context, I am reminded of the remarks of an eminent Ontario jurist, Mr. Justice Riddell of the Ontario Court of Appeal, whose observations almost 50 years ago are equally applicable today.
>
> 'A Royal Commission is not for the purpose of trying a case or a charge against anyone, any person or any institution - but for the purpose of informing the people concerning the facts of the matter to be enquired into. The object of a Royal Commission is to determine facts, not try individuals or institutions, and this consideration is sufficient to guide the Commissioner in the performance of his duty.'

The Court went on to say:

> A public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes.... Such an inquiry is a coercive procedure and is quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility.

We share this view.

Further, we are not - as some have also urged us to do - specifically recommending that Donald Marshall, Jr. receive additional compensation. The Commission accepted that a settlement had been negotiated, and accordingly, heard no evidence on the amount of compensation that may have otherwise been appropriate. However, the Commission did examine the process by which compensation was ultimately negotiated and paid. We have concluded that the negotiations were strongly influenced by factors which, in our view, were either wrong or inappropriate, and that as a result the compensation process was so seriously flawed that the amount paid should be re-evaluated.

To understand how we reached our conclusions concerning the Marshall case and the subsequent recommendations, it is necessary to begin by establishing what really happened in Wentworth Park on the night of May 28, 1971.

Reconstructing those events has not been easy. The ages, capacities and degrees of impairment of some of those involved - coupled with the 18 years that have come between the incident and our attempt to establish what really happened - make it difficult to fully reconstruct all of those events today.

We have sifted, weighed and considered all the evidence and inferences flowing from it, together with the subjective elements of each witness's conduct and demeanor. In assessing the evidence presented, we have considered each witness's personal involvement in the events about which he or she testified and taken into account the fact that some alleged eyewitnesses previously gave untruthful statements to the police and perjured evidence to the courts.

Although we have had the benefit of first-hand evidence from many of the principals, unrestricted by rules of evidence that might otherwise have limited our investigation, much of this evidence has been contradictory and confusing. Some of it, through repetition in a number of proceedings, may even have become elevated from dim recollection to clear fact in the minds of some witnesses. Despite these difficulties, we have satisfied ourselves that we can now accurately reconstruct the events that occurred that night.

While there cannot be any doubt that Sandy Seale was stabbed by Roy Ebsary, an eccentric and volatile old man with a fetish for knives, the events leading up to and following the stabbing have been the subject of countless hours of testimony and debate.

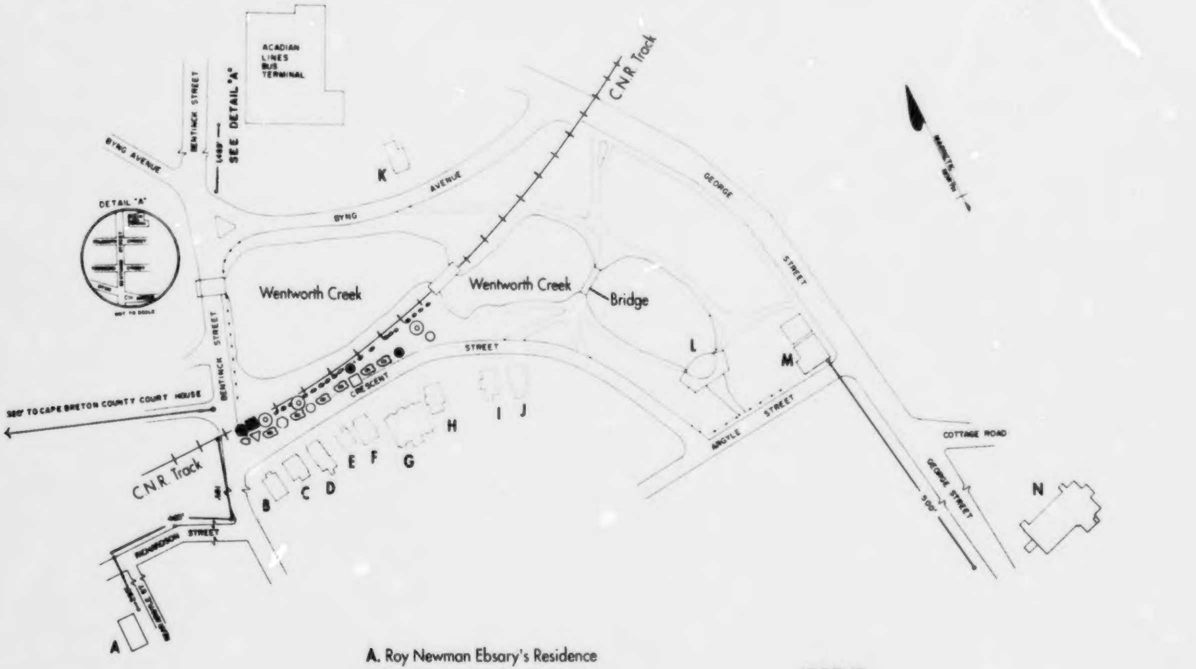
What follows is the Royal Commission's reconstruction of certain of those events, based on our assessment and evaluation of all of the evidence before us.

1.2 The Incident

We find:

- that Sandy Seale was not killed in the course of a robbery, attempted robbery, mugging or rolling.
- that Donald Marshall, Jr. told the truth about the events surrounding the stabbing when first interviewed by the Sydney City Police on the night of the incident.
- that Seale and Marshall met by chance following the dance.
- that Ebsary and MacNeil initiated the contact with Marshall and Seale.
- that Ebsary, MacNeil, Marshall and Seale engaged in a conversation that lasted for several minutes.
- that the stabbing was the result of Ebsary's violent and unpredictable character.

Map of Wentworth Park, Sydney


ACADIAN LINES BUS TERMINAL
BENTINCK STREET
SEE DETAIL "A"
BYNG AVENUE
DETAIL "A"
NOT TO SCALE
K
BYNG AVENUE
C.N.R. Track
GEORGE STREET
Wentworth Creek
Wentworth Creek
Bridge
L
M
CRESCENT STREET
580' TO CAPE BRETON COUNTY COURT HOUSE
BENTINCK STREET
B C D E F G H I J
C.N.R. Track
RICHARDSON STREET
A
ARGYLE STREET
COTTAGE ROAD
GEORGE STREET
500'
N

DETAIL "A"
FALMOUTH STREET
TOWNSEND STREET
BENTINCK STREET
BYNG AVENUE
NOT TO SCALE

Map courtesy of J. Carl MacDonald N.S.L.S.

A. Roy Newman Ebsary's Residence
B. R. Robertson *grey house* (#101)
C. A. MacIntyre *green house* (#102)
D. N.A. MacQuinn *red house* (#106)
E. E.E. MacDonald *light green house* (#108)
F. D.W. Campbell *grey house* (#110)
G. Crescent Apartments *green building*
H. Mrs. L. Doucet *green house* (#120)
I. Mrs. N. Boudreau *grey house* (#130)
J. D.R. MacLean *white house* (#134)
K. M.Mattson *red house* (#103)
L. Bandshell
M. Pollett Drug Store
N. St. Joseph Church

LEGEND

Birch Tree	○
Power Pole (with 125 M.V. light)	●
Power Pole	◎
No Parking Anytime Sign	☐
Stop Ahead Sign	○
Bush	○
Trees	◎
Hedge	-o-o-
Railway Signal Lights	●
Power Box for Railway Signal Light	■
Stop Sign	△
Fence Line	—×—×—

Late in the evening of May 28, 1971, Donald Marshall, Jr. and Sandy Seale met by chance shortly after Seale left St. Joseph's Church Hall on George Street in Sydney. The two were walking through Wentworth Park when they met two other men, Roy Ebsary and James (Jimmy) MacNeil. Following a brief conversation initiated when Ebsary or MacNeil asked for a cigarette, Marshall and/or Seale asked Ebsary and MacNeil for money. This was a low-key, non-violent, non-criminal request, similar to the solicitations many of us routinely experience while walking the streets of any Canadian city. But this simple request triggered in the drunken and dangerous Ebsary a deadly over-reaction. Ebsary's intoxicated and irrational state likely made him believe he was under threat of attack when no such threat existed. Before their encounter that night, in fact, Ebsary had already decided - as he described it later - that "the next man that struck me would die in his tracks". (Exhibit 19, Page 145)

It has been suggested in some previous proceedings that the stabbing may have occurred in the course of an actual or attempted robbery, rolling or mugging, but these terms all imply some degree of criminality and we conclude Seale was not killed as a result of any such incident.

This is not merely an academic distinction. In its 1983 decision acquitting Marshall of Seale's murder, the Court of Appeal of Nova Scotia concluded Marshall and Seale had been involved in an attempted robbery at the time the stabbing took place and that Marshall, by failing to disclose this fact, had contributed in large measure to his own conviction. This conclusion adversely affected Marshall's later attempt to win compensation for his wrongful imprisonment.

Given Ebsary's history, it is conceivable that Ebsary's attack was totally unprovoked. But our view is that his volatility and his desire to be a heroic man of action led him to misinterpret a simple "panhandling" request, and then to overreact to an imagined threat of attack - with tragic consequences.

We have reached that conclusion based on our assessment of the evidence that follows.

1.2.1 Sandy Seale

According to the evidence before us, Sandy Seale was a normal teenager who excelled in athletics and came from a respectable Sydney family that had recently moved from a predominantly Black community in Whitney Pier to a home on the outskirts of the city. His father, Oscar Seale, worked as a motor carrier inspector with the Provincial Government. On the night of May 28, Seale and some friends intended to go to the dance at the church hall but were unable to get in. Seale left the dance hall between 11:30 and 11:40 in order to catch a bus home to the Westmount district before his midnight curfew.

We heard evidence that Seale's parents were strict and that he was concerned about getting home before curfew. Keith Beaver, a teenager who also attended the dance, testified he invited Seale to his house following the dance, but Seale declined, saying he wanted to be sure to catch the bus home. Gail Rudderham Chernin, another Sydney youth who attended the dance, testified Seale told her he was going to Kings Road to hitchhike home. If he failed to get a ride, he said he would catch the last bus to Westmount as it travelled down Kings Road.

The evidence suggests Seale had sufficient money to take the bus home. We heard no evidence to suggest Seale was in any way inclined to criminal activity.

1.2.2 Relationship between Marshall and Seale

Seale met Marshall by chance in the short interval between the time Seale left the dance hall at about 11:40 p.m. and when the stabbing occurred, which was before midnight.

What was the relationship between Seale and Marshall prior to the events of May 28, 1971? It is clear they were not close friends. It would be stretching the point to even call them friends. At best, they were casual acquaintances. We do not believe it likely that two such casual acquaintances would have formed a common intention to rob or mug someone in the park in the very short time between the time they met and the time when the incident occurred.

1.2.3 Ebsary and MacNeil

While walking through the park, Seale and Marshall met two other young people, Terry Gushue and Patricia Harriss. They talked for a while and then Marshall gave Gushue a light for his cigarette. During this conversation, two men called to them from Crescent Street. We have concluded that the two men were Ebsary and MacNeil.

MacNeil, 25, an unemployed labourer, and Ebsary, 59, a former ship's cook, spent the earlier part of the evening drinking in the State Tavern. Ebsary and MacNeil were in the park later that night and had contact with other young people there. George and Alexander MacNeil, two teenagers returning home from the dance, later gave a statement to the police that they passed two men in the park that night who answered generally to the description of MacNeil and Ebsary. The older man was asking for a cigarette from a young man and woman sitting on a bench.

The evidence establishes Ebsary and MacNeil later initiated contact with Seale and Marshall by calling to them from Crescent Street and by asking for cigarettes or a light. Seale went towards the two men and Marshall joined him shortly thereafter.

Once again, this is inconsistent with the suggestion that Seale and Marshall planned to rob or roll Ebsary and MacNeil.

1.2.4 Roy Ebsary's testimony

Roy Ebsary was the first witness to appear before the Royal Commission. It was the only time Ebsary ever testified about the incident in the park.

Transcript, Page 40

Q. Okay, what happened as you were walking that path?
A. Well, there was nothing happened as we were walking the path.
Q. Okay, just tell us what happened?
A. When we were up on Crescent Street and almost over to South Bentinck, I heard footsteps behind us and there was two fellas jumped around, jumped in front of us.
Q. Two fellas jumped in front of you?
A. Right.
Q. They came from behind you and jumped in front of you?
A. Yes, right.
Q. And what happened then?
A. They demanded everything we had on us and the bigger of the two was flexing his muscles and telling us what he'd do to us if we didn't dig out.

Transcript, Page 41

Q. But I'm trying to find out what you saw yourself that night. You were walking along and someone jumped in front of you?
A. Yeh, that's right.
Q. Tell us from there, Mr. Ebsary, what - they demanded, you said, everything from you?
A. Right.
Q. What happened after that?
A. They said dig down.
Q. Dig down?
A. Right. So the bigger of the one, he grabbed MacNeil around the throat - he took - the road's about 40 feet wide he took him across the road and about 60 foot down the road, right, toward South Bentinck.

Transcript, Page 42

Q. Now you said the bigger fellow grabbed MacNeil around the throat and took him somewhere?
A. Right, yes.
Q. Took him where?
A. We weren't on the - he took him across the street.
Q. So across the street toward, toward Bentinck Street?
A. No, toward the park side.
Q. Toward the park side, okay?
A. There was bushes there, see.
Q. Okay, there are bushes down on this part?
A. Yeh, and MacNeil started to scream.
Q. MacNeil was screaming?
A. MacNeil was screaming, you could hear him all over the bloody park. And this other fella said to me, he said, dig down man, dig down, and give me all you got.

Transcript, Page 43

Q. All right, now you say the person in front of you says, what did you say, dig deep?
A. Dig man, dig.
Q. Dig man, dig. What happened, Mr. Ebsary?
A. Well, I gave him everything I had in my pocket, right. I dug down, dug down. He was holding out his hands so I gave to him what I had. And then when I put my hand down into the raincoat pocket, like, I found the bloody pocket knife.

Transcript, Page 45

Q. Okay. So you reached in and you found this pocket knife in your Burberry. What took place after that?
A. Well, I was after giving him all that I had, right?

Q. Yes.
A. So, I put my hand in the Burberry pocket to see what was in there, right. I discovered the knife was there, right. And I pulled it out and I opened it, right. And then I took a swipe at him.
Q. You took a swipe at the fellow that was in front of you?
A. Yeh, right. But I don't know if I connected because the other fellow was screaming on the other side of the street and my mind was distracted because I didn't know what the hell was happening over there.
Q. After you took a swipe at him, what, what did the fellow that was in front of you do?
A. He ran the whole length of Crescent Street and went around the bend that's in Crescent Street. And that's the last I saw of him.

As to any conversation taking place, Ebsary testified on direct examination as follows:

Transcript, Page 47

Q. Did you have any conversation with these fellows when they jumped in front of you? Any talking or anything?
A. No, there was no talking any more than what the big fella was going to do to us if we didn't hand over our - whatever we had in our pockets.

Later, he testified that there was a conversation.

Transcript, Page 183

Q. What was it about?
A. I invited the boys to come up to the house because I was going to have a barbecue.
Q. You invited them to come to the house because you were going to have a barbecue?
A. Right.
Q. How did that arise, that exchange?
A. Well, I don't know.
Q. You must have had some talk before that. You wouldn't meet strangers and say, 'Come on over to the house and have a barbecue'?
A. Why not? I often did.
Q. No, but you would have had to have some kind of small talk before that.
A. Well if there was, I don't remember what it was.
Q. You agree with me, though, that it's likely you had some talk before the invitation.
A. Well, if there was, there was damn little.

On later cross-examination by counsel for Oscar Seale, Sandy's father, Ebsary said:

Transcript, Page 294

Q. So you are on Crescent Street and the next thing, there are footsteps that you hear coming?
A. Right.
Q. Yes, and I take it that these people caught up with you?
A. That's right. They overtook us as a matter of fact.
Q. They overtook you and had they passed you?
A. Well, as soon as they rounded us, they confronted us.
Q. Yes. That's the point. You see, I want to find out about the invitation for the barbecue.
A. Well, I invited them up to the house because MacNeil and I were bound for the house.
Q. Okay.
A. And the barbecue. So we bumped into the other two and I said, 'Why not come along?'
Q. I see. I see. But the problem I'm having is that if I was to tell somebody I bumped into you I would get the impression that I'm approaching you and we

meet, but if somebody comes from behind and passes me I don't know that I can say I bumped into him.

A. Oh, yes.
Q. Do you understand the difficulty I'm having?
A. Oh, yes, quite.
Q. Well, perhaps you'd just assist me across that?
A. Now listen.
Q. Sure.
A. We're walking along and we hear - or I hear footsteps behind us.
Q. Sure.
A. And they're approaching us rapidly, so I figure they're going to try to pass us, right? Well, they came right up behind us, right? One goes this way and the other fellow goes that way and they turn around and confront us. Now does that clear your mind?
Q. Well, that has cleared me up as far as the meeting and how you became face to face.
A. Right.
Q. So now you're face to face. Then the invitation for the barbecue, does that happen right then?
A. Right then.

Transcript, Page 297

Q. So these people are now in front of you and you invite them for a barbecue?
A. Right.
Q. Was there a response? Did anybody say anything?
A. The only thing that was said was, 'Dig man, dig,' so they refused to come to the house, right?
Q. I see.
A. And they wanted whatever we had in our pockets.
Q. I see. Were you offended by the fact that they had rejected the invitation to come to your barbecue?
A. No, but I was a bit startled when they said, 'Dig man, dig.'

There is no reference in any of Ebsary's earlier statements, or in a tape recording he gave to RCMP investigators during the 1982 reinvestigation of the Seale murder, concerning any conversation about a barbecue or other pleasantries.

How believable is Ebsary's evidence? Consider the following extract from Ebsary's own testimony. Ebsary is referring to one of his meetings with David Ratchford, a martial arts instructor who was interested in the facts of the stabbing. Ebsary's comments here should be borne in mind when considering his other evidence.

Transcript, Page 204

A. My dear boy, what I told Ratchford could have been any bloody thing.
Q. Why would you want to lie to Mr. Ratchford?
A. I didn't say I lied to Ratchford, did I?
Q. Why would you want to tell him, to use your language, 'any bloody thing'?
A. Repeat that question.
Q. Why would you want to tell Mr. Ratchford, 'any bloody thing', to use your language?
A. Because he'd believe it.
Q. And is that what you do, if someone will believe it, you'll tell them any bloody thing?
A. Right, why not?
Q. Even now?
A. Even now.
Q. Even today?
A. Even today.

The suggestion that Ebsary invited Marshall and Seale to his house for a drink is supported by Marshall's testimony, particularly that given at the third Ebsary trial. Ebsary was likely to make such an offer. His wife, Mary Ebsary, testified that it was not unusual for her husband to bring home complete strangers at odd hours. On balance, it is our view that a conversation indeed took place involving Marshall, Seale, Ebsary and MacNeil, and that it lasted for several minutes.

1.2.5 The conversation

Marshall has consistently stated that the conversation included references to priests, women and bootleggers. On the other hand, MacNeil has just as consistently testified no conversation occurred prior to the stabbing, other than a demand to "dig man, dig".

MacNeil was drunk that night, and his memory may be faulty. Under cross-examination by counsel for Donald Marshall, Jr., MacNeil agreed there may have been an earlier conversation with Marshall and Seale about a light and a cigarette, and that he had simply not paid any attention to it.

If the stabbing had taken place as soon as Marshall and Seale joined Ebsary and MacNeil - as MacNeil testified - it would have happened within a minute after Marshall and Seale left Gushue and Harriss. But if that is what happened, Harriss and Gushue would have heard such an attack and its aftermath. Harriss testified she and Gushue went home by way of Crescent Street towards Bentinck Street, thus placing them directly on the route taken by Ebsary, MacNeil, and Marshall. Given that, the more likely explanation is that some period of time elapsed between the encounter involving Harriss, Gushue, Marshall and Seale and the stabbing of Seale, and that this time was taken up by conversation involving Marshall, Seale, Ebsary and MacNeil.

1.2.6 The stabbing and its aftermath

At the end of the conversation, we believe that either Marshall or Seale requested money. In the course of this request, and likely because Ebsary's response was less than positive, Seale said, "Dig man, dig". We believe this represented, at most, an expression of impatience or frustration by Seale, who wanted Ebsary to check more quickly to find out whether he had any money, and that the request was not accompanied by any verbal or physical threats from Marshall or Seale. The comment, however, focussed Ebsary's attention on Seale, leading Ebsary to make a statement to the effect, "This is for you, black man." He then stabbed Seale.

Marshall quickly grabbed MacNeil, pushing him aside, but Ebsary then confronted Marshall and stabbed him in the arm. Marshall then ran. We do not accept Ebsary's evidence that MacNeil was screaming and was dragged away by Marshall. We also do not believe Seale ran any distance after being stabbed.

Following the stabbing, Marshall ran around the perimeter of the park looking for help. He met Maynard Chant on Byng Avenue in front of Marvel Mattson's residence. Chant, a 14-year-old who was on probation on a minor theft charge at the time, had been attempting to hitchhike home to Louisbourg after spending the evening in Sydney. Marshall quickly told Chant what had happened and then they flagged down a passing car and were driven back to the scene of the stabbing. Marshall and Chant got out, and the car left. The driver of the car was never sought out nor identified by the police. At the scene, Chant tended to Seale, placing his shirt on Seale's wound. Seale said nothing to Chant. Marshall meanwhile went to a nearby residence where he asked the person there to call for an ambulance. Marshall then returned to the scene and stood some distance from Seale.

Marvel Mattson, a former RCMP officer who lived on Byng Avenue near the park, testified he overheard Marshall tell Chant about the stabbing, and called the Sydney City Police Department to advise them of the incident at about ten minutes before midnight.

1.2.7 Donald Marshall, Jr.

The first officer to interview Marshall after the stabbing was Sydney City Police Detective Michael Bernard MacDonald (known as "M.R. MacDonald"). MacDonald testified that he questioned Marshall at City Hospital in the very early morning hours of May 29, 1971, and that he wrote his notes from memory on returning to the police station at around 3 o'clock that same morning. At that time, Marshall was not asked to sign a statement.

MacDonald's notes read, in part:

Exhibit 38

> May 29/72 [sic] 12:10 AM
>
> I was called at home by Sgt. Len MacGillivray, and I proceeded to the City Hospital in my own car, on arriving they were taking in Sandy Seale, Leo Curry and Doucette. I noticed Donald Marshall in another small room, and he had a cut on the inside of his left arm, about 10 ins. from his wrist. I questioned him as to what happened and he said two men stopped them in the park and asked for a cigarette, he said he gave them a cigarette and a light, and then one of the men pulled out a knife and said to Seale "This is for you black man" and then he drove it into Seale, he then made a dive at me and I covered up, but he cut me. I then made a kick at him, around the head, and then I ran away to Bentinck St. I hit the sign post when I ran. I then went to the room where Seale was, and hoped that I could ask him a question, as to what happened. I was asked to leave by Dr. I then helped the Dr., nurse and orderly to lift Seale from one stretcher to another, and he was removed to the 3rd floor. Donald Marshall was stitched up, and given a needle, and was returned to his home.
>
> One man heavy set, short, dark blue coat to knees, hair-grey, black low shoes, wearing glasses-dark rims. Second man, tall - 5'11", black hair, clean shaven, corduroy coat 3/4-length, brown in color.

This information, taken from Marshall very shortly after the stabbing, is detailed, and includes relatively accurate descriptions of Ebsary and MacNeil. Marshall clearly was not reluctant to provide these descriptions, and it is reasonable to assume he hoped and expected these men would be apprehended.

If the stabbing had occurred in the course of an attempted robbery, that would surely have come to light once these individuals were found. It is illogical and contradictory to suggest that Marshall could have been concealing the fact of a robbery while actively seeking out and assisting the police to find two individuals who - once found - would obviously refer to any robbery.

It is also worth noting that when Marshall first spoke to MacDonald at the hospital, Seale was still alive. Marshall would have no reason to believe then that Seale would not survive, and we can reasonably assume Marshall would have expected Seale to later corroborate his story.

Given all the circumstances, we believe it is highly unlikely that Marshall could have collected his thoughts and composure sufficiently to concoct the story he gave to MacDonald. The simple fact is that Donald Marshall, Jr. told the truth.

1.2.8 Ebsary's violent character

We reiterate our conclusion that the stabbing was a direct result of Ebsary's violent and unpredictable character, traits which were magnified after he consumed alcohol. The evidence supports the conclusion that Ebsary was capable of such dangerous and explosive behavior, particularly after having consumed alcohol.

Mary Ebsary, his wife of 29 years, described him as having a "bad, bad temper" when he was drinking. She testified as follows:

Transcript, Page 4535

Q. Did he have any kind of temper?
A. Who, Roy?
Q. Yes.
A. Roy was all temper.
Q. Was he?
A. Yes.
Q. How did he show that?
A. Well, if it was a dull day and you said it would maybe get fine, that would be the cause of a storm if it wasn't said the way he liked it said. He was very quick to jump at just anything. Anything at all.
Q. When you say that he'd jump at anything, would he jump physically or with words.
A. No. Verbally.
Q. Verbally?
A. Yes.
Q. Did he have any violent tendencies that you were aware?
A. Yes. You mean breaking things, throwing things?
Q. Yes.
A. Yes.
Q. How would they be triggered?
A. I don't know. Possibly the things that were going through his mind. At least - that's the only - only way that I can describe that. He'd be sitting in a pensive mood and then quite suddenly he'd jump up probably and throw a cup or his dinner or anything across the room and from then he'd go on a tear and he'd break anything he had - get his hands on. And in the meantime he'd be screaming and yelling and -

Transcript, Page 4554

Q. Do you remember this night how drunk he was?
A. Yeh, well, I'd say he was pretty drunk.
Q. Pretty drunk. You told us before that particularly when he was drinking he would be unpredictable.
A. Very unpredictable. That's why I never spoke to him when he was drinking.
Q. Okay. From what you remember of how drunk he was that night would you be able to tell if he was in fact in the unpredictable mood that night?
A. He - It wouldn't have taken anything to arouse him. To make him pretty annoyed that night.

Mary Ebsary testified that she believed Roy Ebsary would, if threatened, probably attempt to use reason before resorting to violence. Both Mary and Greg Ebsary, his son, testified that he never physically harmed or assaulted his family.

Mary Ebsary told the Royal Commission about an incident in May 1970 when Roy Ebsary, while drunk, grabbed a long sandwich knife and set off in search of Tony Tratnick, a co-worker with whom he had had a dispute. The Sydney City Police were called, Ebsary was apprehended and subsequently convicted of carrying a concealed weapon. (Exhibit 16, Page 105)

Donna Ebsary, Roy Ebsary's daughter, did not testify before the Commission because she now resides in the United States and refused to appear. She did, however, give the following evidence at the Reference hearing in 1982:

Exhibit 3, Page 124

Q. What can you say as to your father's potential for physical violence?
A. He had a great potential for physical violence.
Q. In what sense? Are you able to support that with any particular instance or incident?
A. Can I say it from the past or does it have to be after 1971? Can it be prior to that?
Q. Just generally if you can cite a particular instance.
A. Well my father was very easily enraged by things and at which point he would not stop at just like beating up the house. He would kill - he would kill things and he would - he had on occasions been stopped from going out and killing people.
Q. Now when you say killing things, what are you referring to when you're talking about things?
A. Well, when I was younger, I was more or less to myself and the only thing that I really related to were animals and he on one occasion came into the house, grabbed a budgie I had and ripped the head off it. And on another occasion I had a cat that I would relate to and he killed that. I had on several occasions had to leave home because of the violence that was going on and I didn't feel safe around him then.

David Ratchford, a martial arts instructor who taught Donna and who became interested in the Seale murder after discussing the case with her, testified that during a visit in 1982 to Ebsary's house:

Transcript, Page 4425

A. ... I sat on the chesterfield against a wall and the old fellow seemed to be quite nervous. He was pacing back and forth and he told me that the RCMP had been in and had taken everything - all his papers and tapes and weapons and things that he had in there and had taken everything out of there. And he started to - then he started saying to me, he said, 'What are you trying to do to me?' And I said, 'What are you talking about? I don't understand.' And he turned around and he had a crudely fashioned knife. It was a knife that had been broke. It had been honed, you know, on a grindstone. And he wheeled around - he had the motions of a cat. And he wheeled around and in a second flash he had the point of that

> knife to my throat and my head pushed back against the wall like this.

Dr. James O'Brien, a psychiatrist who examined Ebsary for the Royal Commission, agreed Ebsary was capable of explosive and aggressive behavior, particularly after consuming alcohol. (Transcript, Page 2347)

The uncontradicted evidence is that Ebsary was fascinated with knives. He would make knives and sharpen them, sometimes on both sides, on his own grindstone. He would constantly carry a knife, and would often walk about town with the blade of an unsheathed knife protruding from his back pocket. (Transcript, Page 4538) His criminal record includes two knife-related convictions. Ebsary's fascination with knives, together with his capacity for explosive and violent behavior, convince us that he was capable of stabbing Seale with little, if any, provocation.

1.2.9 Jimmy MacNeil's evidence

In concluding that there was no robbery or attempted robbery, we have rejected much of the evidence, or at least the tenor of the evidence, of Jimmy MacNeil. Much of MacNeil's evidence - contained in ten different statements or transcripts of testimony at various proceedings - is conflicting and confusing. He was easily led by counsel. The following exchange between MacNeil and counsel for Oscar Seale will illustrate the point:

Transcript, Page 600

Q. And the tavern then would close at what time?
A. Eleven thirty.
Q. Eleven thirty. Now, was it quite short [sic] after the last call that you left or close to when it was closing?
A. Pretty close to after the last call.
Q. So the last call was at eleven?
A. Yes.
Q. Would you have left by quarter past eleven?
A. Probably.
Q. Would you have left by ten past eleven?
A. Probably.
Q. Would you have left by five minutes past eleven?
A. Probably.
Q. Would you have left by one minute past eleven?
A. Yes.
Q. Would you have left, maybe, ten minutes before eleven?
A. Probably.
Q. I see. How about ten thirty? Could you have left around ten thirty?
A. Probably ...

MacNeil had been drinking heavily on May 28, 1971. He admitted having consumed some beer, and likely some wine, at home before going to the State Tavern. The time he arrived there is not clear. MacNeil testified on occasion that it was 5 p.m. and on other occasions that it was 8 p.m. He agreed he would drink roughly five beers per hour, and that on leaving the tavern he was drunk but not "paralyzed". He admitted staggering and weaving, but stated he was not falling down.

His first formal recounting of the incident in the park occurred on November 15, 1971, almost six months after the stabbing. (Exhibit 16, Page 176) On that occasion, the Sydney City Police took statements from MacNeil and his brothers, John and David, with whom he had discussed the events surrounding the stabbing. The statements of MacNeil's brothers indicate that Jimmy MacNeil told them essentially the same story he told police. All of the MacNeils, for example, mentioned Marshall grabbing MacNeil and putting his arm behind his back. The statements of Jimmy and David MacNeil mention Ebsary saying, "I have something for you." The statement of John MacNeil does not mention any request for money, while David MacNeil's reads, "Marshall and Seale asked them for money." Jimmy MacNeil's statement contains the "Dig man, dig" reference.

Let us briefly consider some of the inconsistencies in MacNeil's evidence. Was MacNeil drunk?

Exhibit 3, Page 100

Q. Mr. MacNeil, you told my learned friend that you were not drunk that evening, that you definitely were not - well, you didn't use those words. That you were not staggering or nothing, I think you said. Is that correct?
A. Yeh, that's correct. I wasn't staggering.
Q. Mr. MacNeil, are you sure about that?
A. I'm positive I wasn't staggering.
Q. So your walk was steady?
A. My walk was steady, yeh. I wasn't staggering.
Q. At the time when you had contact with Mr. Marshall and Mr. Seale, did you stumble or trip on anything before Mr. Marshall got hold of you?
A. No, no, I never stumbled. I never tripped.
Q. Are you sure?
A. Positive.
Q. And you indicated to my learned friend that Mr. Marshall took hold of you and put your right arm, I believe you indicated, up behind your back. Is that correct?
A. Yeh.
Q. What would you say if it was suggested that he was simply trying to keep you from falling?
A. No, he wasn't keeping - he wasn't trying to keep me from falling. No. No.
Q. You'd disagree with that?
A. I disagree with it a hundred percent. I disagree with it.

Transcript, Page 387

A. You know, I might have had a little stagger, but I was - I was - you know, I was walking.
Q. You had a little stagger?
A. Yeh.

Transcript, Page 395

Q. You also told us that after having this beer of perhaps an indefinite number, that you had a stagger or a little stagger, but I think you also told us that you didn't need any support. You didn't have to hold onto Mr. Ebsary to keep yourself up?
A. Oh, no. No, I wasn't that - I wasn't that drunk.
Q. Okay. Now when you say a little stagger does this mean you weave from side to side as you're walking?
A. Yeh.
Q. Okay. Do you remember doing that?
A. Yeh.
Q. Okay. Did you fall down at any time?
A. Oh no, I never fell down. No.

Transcript, Page 573

Q. Now I'm going to suggest to you, sir, that's just the kind of feeling you would have, not when someone's jacking up your arm, but when someone just grabs your arm for a split second maybe when you trip, that's just the kind of feeling you'd have, right?
A. Yeh.
Q. Correct?
A. Yeh.
Q. And that today you can't be certain that that isn't what caused the feeling, just someone grabbing it for a second when you staggered, right, Mr. MacNeil?
A. No.
Q. You can't be certain?
A. No.

There were other areas in which MacNeil contradicted himself in his testimony, including whether Ebsary knew MacNeil's father for two weeks or six months; whether MacNeil himself had known Ebsary for two weeks or six months; whether his view of Marshall's red eyes came from a dream; whether his view of Seale's blood and intestines came from a dream; whether he and Ebsary were approached from behind or from the front; whether he and Ebsary turned left on Crescent Street towards Argyle or right towards Bentinck Street; whether he and Ebsary were called back by Marshall and Seale; whether he saw a knife in the park.

Under cross-examination by counsel for Donald Marshall, Jr. (Transcript, Page 540), MacNeil agreed the reasons for the differences in his testimony may include the fact that he was drinking, that he had powerful dreams from time to time and that he may have received information from other sources. For example, he did not know either Marshall or Seale on the night in question, yet he was later able to identify Marshall and Seale as the people in question from reading accounts of the trial in November 1971. This is borne out by the reference in David MacNeil's statement of November 15, 1971 that Jimmy did not know Marshall and Seale and that he read their names in the paper.

Despite the many contradictions in MacNeil's evidence, there are areas where his testimony and statements have been consistent. He has consistently said there was no conversation among the four men prior to the incident. During the Ebsary preliminary and trials, he was positive no conversation occurred; at the Royal Commission, when asked about a number of specific references to priests, women, bootleggers and so on, he said that he recalled no such references. He categorically denied any reference to an invitation to a barbecue, saying he would have remembered it and that Ebsary was as "crazy as a bag of hammers" for testifying to that effect. Despite MacNeil's consistency in this evidence, we do not accept it for the reasons already given.

He has also been consistent in referring to the fact of the "Dig man, dig" reference. He identified the voice as being that of a "coloured" man whom he later identified as Seale. Again, under cross-examination by counsel for Donald Marshall, Jr. (Transcript, Page 574), he said he couldn't be certain whether Seale or Ebsary said these words. Under later cross-examination by counsel for Oscar Seale (Transcript, Page 602), he was positive that the statement was made by Seale. We accept MacNeil's evidence on this point.

He has also been consistent in claiming that Marshall held his arm. This has not been challenged. But whether Marshall did this in the course of assisting a drunken MacNeil or in the course of Seale's advances or stabbing has been the subject of dispute and conflicting testimony. As indicated, we believe Marshall grabbed MacNeil as soon as Ebsary stabbed Seale. It was thus a response to Ebsary's action rather than a part of any attempt to obtain money by force.

MacNeil has been consistent in his recollection of Ebsary saying "I got something for you." The first reference to this statement occurs in the 1971 statements. We accept his evidence on this point. He has consistently maintained that Ebsary stabbed Seale. The truth of this is now beyond doubt.

MacNeil was not an impressive witness. Although he has tried to tell the truth each time he has testified, we believe his recollection has been seriously affected by time and by his drunken state on the night in question, as well as by suggestions from counsel and others.

In our view, it is probable that Ebsary placed the idea of the robbery and of an attack in MacNeil's mind during the walk from the park to Ebsary's house that night. We find it inconceivable that there would be no conversation between the two men following this incident, particularly in view of Ebsary's evident desire to be a hero and to revel in and embellish his own exploits. (The fact that Ebsary in his testimony before us claimed personal credit for sinking the Bismarck lends support to our conclusion that he would not shrink from embellishing a set of circumstances to enhance others' view of him.

Transcript, Page 145

A. You know I killed 3,000 men one morning before breakfast?
Q. Would you explain that for me?
A. Yes, I sank the Bismarck.)

Although Ebsary was intoxicated on the night of the stabbing, we believe he was sufficiently astute to recognize his predicament and to take steps to "brainwash" MacNeil. This would account for MacNeil's outburst to Mary Ebsary after the two drunken men reached Ebsary's home on Rear Argyle Street that "Roy saved my life".

But the actions of Ebsary following the stabbing are not consistent with those of a man who has resorted to violence only in self-defence. He and MacNeil not only left the scene quickly, but they also made no report about it to the police. In addition, Ebsary told MacNeil to avoid the park area on his way home from Ebsary's house. Once again, we are drawn to the irresistible conclusion that Ebsary stabbed Seale without provocation and then attempted to concoct a story to make it seem like self-defence.

1.2.10 The "No cops" statement

Deborah MacPherson Timmins, who had not previously given evidence about the incident, testified before the Royal Commission that she and her boyfriend, Scott MacKay, discovered Sandy Seale lying on Crescent Street while they were walking home from the dance. MacKay bent down beside Seale, but Timmins did not overhear any conversation between them. There was no evidence before us to indicate that any conversation took place. MacKay then went to get help while Timmins remained with Seale. She testified concerning a conversation she said she had with Seale during this time.

Transcript, Page 709

Q. Did you say anything to Sandy during the time that Scott was there?
A. No, no.
Q. Okay, and then what happened, did Scott leave?
A. Yes, he did. I recall Scott going to a home to - he said he was going to [get] help, but the house that he went to, they didn't answer the door, like he wasn't gone very long, and in that period of time I had said to Sandy, I said, "He's gone for help." He said, "No cops," and I sort of kind of backed off.
Q. (Mr. Chairman) Who said "No cops"?
A. (Mr. Spicer) Sandy said it.
A. (The Witness) And then I kind of backed off and I said - I didn't really say anything more. I had no conversation and then he said, "Move me," and like I was kind of stunned, I didn't say anything.
Q. Was anything else said by Sandy when you were there by yourself other than that, other than "no cops"?
A. No, nothing.
Q. And did you say anything more to Sandy yourself?
A. No, no, because I was kind of surprised, you know, that he had said something like that.

Timmins testified that she said nothing to MacKay about the comment but later, when interviewed by the Sydney City Police, told them about the "No cops" comment. (Transcript, Page 715) She also testified to signing a statement. This statement has never been found.

We consider her evidence as a whole to be fragile. It is unlikely the police would destroy or lose any written statement. If there was such a statement - including the phrase, "No cops" - it would have implicated Marshall, and been kept. It is also highly unusual that Timmins did not relay the comment in question to MacKay. For these reasons, we are not convinced the comment was made.

Even if the comment were made, however, such evidence would not be inconsistent with our conclusion that neither Marshall nor Seale was involved in any criminal activity. Given that Seale's parents were strict, it is possible Seale feared he could be in trouble with his parents if it were discovered that he was involved with the authorities. Seale might also not have wanted his parents to find out that he had participated in a solicitation for money from two drunks in the park.

1.3 The Police Response

We find:

- that the immediate police response to the stabbing was entirely inadequate, incompetent and unprofessional.
- that the subsequent MacIntyre investigation was inadequate, incompetent and unprofessional.
- that MacIntyre, without any evidence to support his conclusions and in the face of evidence to the contrary, had identified Marshall as the prime suspect by the morning of May 29, 1971 and concluded that the incident occurred as the result of an argument.
- that the fact that Marshall was a Native was one of the reasons MacIntyre identified him as the prime suspect.
- that MacIntyre accepted evidence that supported his conclusion and rejected evidence that discounted that conclusion.
- that MacIntyre should not have ignored the statements given by George and Sandy MacNeil, which described two men fitting the descriptions given by Marshall in the park at the time of the incident.
- that MacIntyre failed to pursue efforts to locate the two men Marshall had described as being involved in Seale's killing.
- that the Sydney City Police Department should have taken advantage of the investigative facilities and services available from the RCMP.
- that an autopsy should have been performed on Sandy Seale.
- that the information in John Pratico's statement of June 4, 1971 resulted from suggestions MacIntyre made to Pratico.
- that MacIntyre's interview with Maynard Chant was conducted in an intimidating and unacceptable manner.
- that the information in Chant's statement of June 4, 1971 concerning a dark-haired fellow in the bushes, an argument, and Marshall stabbing Seale, resulted from suggestions MacIntyre made to Chant.
- that Urquhart did not crumple up and throw away Patricia Harriss' partially completed statements.
- that Harriss used information given to her by someone else in providing the first story she told police.
- that Urquhart, although a secondary player in the MacIntyre investigation, had a responsibility to speak out when the investigation was being conducted improperly.
- that Robert Patterson was found by Sydney City Police and questioned but no statement was taken.

There were two distinct phases to the police response to the stabbing in Wentworth Park. The first involved the crime scene investigation - what the police did, and did not do - in the immediate aftermath of the crime. The second involved the investigation by Sergeant of Detectives John MacIntyre that led to Donald Marshall, Jr.'s arrest and conviction.

After considering the evidence that will be detailed in the pages that follow, we have concluded that the police response was woefully inadequate. In addition, we conclude that the subsequent MacIntyre investigation was conducted in an incompetent and unprofessional manner.

1.3.1 The night of May 28-29, 1971

Shortly before midnight on May 28, 1971, the Sydney City Police Department received a report of the stabbing in Wentworth Park. Two patrol cars, carrying Constables Leo Mroz, Howard Dean, Richard Walsh and Martin MacDonald were dispatched to the scene. (Mroz and Martin MacDonald have since died; Dean, now Corporal Dean, and Walsh, now Chief of Police Walsh, both testified before the Royal Commission.)

The first concern of the constables who arrived at the scene was to assist Sandy Seale. While Walsh and Mroz waited for an ambulance to arrive to take Seale to City Hospital, Dean and MacDonald drove Marshall, who had been cut on the arm, to the hospital in their patrol car. After the ambulance arrived to get Seale, Walsh and Mroz followed it to the hospital. No police officer remained at the scene, made any attempt to protect the scene or cordon off the area, conducted a search of the area, or even took any names or questioned any witnesses.

Shortly after Dean and MacDonald delivered Marshall to the hospital out-patient department, they returned to patrol duties. After Walsh and Mroz helped undress Seale - they heard him say, "I can't breathe" - they too went back to their patrol duties. None of the constables returned to the scene of the incident.

In addition to initially dispatching the constables to the scene, Sydney City Police Desk Sergeant Len MacGillivray also notified Detective Michael Bernard MacDonald ("M. R. MacDonald"), who was at home at the time, having completed his shift at midnight. MacDonald also went to the hospital rather than to the crime scene.

After he arrived there, MacDonald helped place Seale on a stretcher and spoke briefly to Marshall. (MacDonald's notes of the conversation are included in Exhibit 38, referred to earlier.) According to his testimony at Marshall's 1971 trial, MacDonald also spoke briefly to Maynard Chant, whose presence had been brought to his attention by Constables John Johnston and Frank MacKenzie. MacDonald testified that he spoke briefly with Chant at the hospital and made arrangements to have him picked up by his father. He has no notes or record of that conversation.

MacDonald received no information from the four constables who had been at the scene, although he did say he was advised by Martin MacDonald that Marshall had a cut on his left arm.

At the hospital, no one made any attempt to examine or obtain Seale's clothing, no one took an inventory of Seale's possessions, and no one asked the hospital to secure Seale's clothing and possessions for inspection at a later date.

Detective MacDonald testified as follows concerning his activities after leaving the hospital:

Transcript, Page 1660

A. I drove from the City Hospital down to the Crescent Street area and drove through the park area.
Q. You drove through the park area?
A. Yes, sir.
Q. May I ask why?
A. Well, I stopped - I stopped at the corner of Crescent Street and Bentinck and I got out of my - I had my own car. I got out of my car and I took my flashlight and I walked along the sidewalk on the side the houses were on for around four or five houses or so.
Q. Why -
A. Well, just looking and maybe I might have picked something up or saw something.
Q. Did you know where Mr. Seale had been found?
A. From the information I received, yes. Down closer to the bandshell area; you know, off the park and Crescent Street.
Q. Did you walk to the spot where he was found?
A. No, sir, I didn't.
Q. May I ask why?
A. I just didn't.
Q. I'm sorry.
A. I just didn't.
Q. Did you, in fact, find anything on your visit to the park?
A. No, sir.

Although Marshall provided MacDonald with a description of the men he said had attacked Seale and him (Exhibit 38) - "One man heavy set, short, dark blue coat to knees, hair-grey, black low shoes, wearing glasses - dark rims. Second man, tall - 5'11", black hair, clean shaven, corduroy coat 3/4-length, brown in color" - and although Sydney City Police Department records indicate police on duty that night kept a look-out for the two men, the search was apparently not afforded any priority. MacDonald's testimony is as follows:

Transcript, Page 1663

Q. Now, sir, before you went home, at any time during that evening, did you give any instructions to any other police officer or constable as to anything that you wanted done?
A. No, just Sergeant MacGillivray. We had a briefing and he was the desk sergeant and I think from what I hear, he contacted patrol cars and advised them what to look for, for the rest of the night.
Q. Did you give the information to Sgt. MacGillivray?
A. Well, I had a briefing with him on this incident.
Q. Okay. When you say a briefing, what exactly does that mean?
A. Well, I - to the best of my knowledge I explained to him what took place on Crescent Street and the men in the patrol cars, what they - you know, for the rest of the night what they would look for and maybe somebody came back into the park fitting the description that I received from Marshall and if they wanted to look around the park area, you know, if they had a few minutes to spare away from their regular patrol.
Q. Were you treating this as a priority at the time?
A. Pardon, sir.
Q. Were you treating this investigation as a priority on three o'clock on the Saturday morning?
A. Well - yes.
Q. You're telling us that the patrolmen would look around if they had time off from their other duties?
A. Right. Well, they had the rest of the city to look after also.
Q. I see. That sounds like, sir, that the rest of the city becomes a priority and this investigation would take second place?
A. Well, that's hard to - hard to explain.
Q. Do you recall giving any specific instructions to Sgt. MacGillivray as to what you'd like the constables to do for you?
A. Well, like I explained to - if they had a few minutes, they'd go in the park area and some of them can do some walking, you know, around the area of the crime.

Various police officers, including RCMP officers, testified before the Royal Commission. When asked about police procedure on the night in question, they were unanimous in describing the crime scene investigation - the failure to secure the crime scene, the failure to interview everyone present in the park, the failure to obtain statements from Marshall and Chant - as woefully inadequate and deficient. The Royal Commission shares this view.

The response by the Sydney City Police Department on the night of May 28-29 was incompetent to the point of negligence. Had proper and thorough investigation techniques been followed, it is highly unlikely that later events would have unfolded as they did.

The police should have taken the elementary steps of securing the crime scene, interviewing everyone present in the park area when they arrived, recording their names and asking certain basic questions. If this had been done, it might have confirmed that two individuals answering the description given by Marshall were actually in the park. The police might also have noticed and perhaps later located the car that carried Marshall and Chant back to the scene.

The police should also have taken an immediate statement from Marshall himself. Their failure to do so is startling. While Detective MacDonald's notes are detailed, they lack the formality of a statement. If Marshall had signed a full and complete statement within an hour of the event, such a statement might have seemed more credible to investigators than the one that was finally taken 40 hours later, after Seale had died.

Perhaps the most grievous error in the police response that night, however, was their failure to interview and take a statement from Maynard Chant. After Marshall and Seale had been taken to the hospital, Chant left the park to hitchhike to Louisbourg. Constables John Johnston and Frank MacKenzie noticed Chant holding a blood-stained shirt. They questioned him about the stabbing in the park and Chant replied that he "had seen it all." He was then taken to MacDonald who was at the hospital.

Detective MacDonald testified he viewed Chant as "just a normal hitchhiker." (Transcript, Page 1638) In our view, this is beyond belief. A blood-stained shirt is not the trademark of a normal hitchhiker. Since Johnston and MacKenzie thought it necessary to bring Chant to the hospital, surely they would also have reported to MacDonald that Chant had said he had seen everything.

MacDonald should have interviewed Chant immediately and carefully and should have taken a full statement. If this had been done, we believe Chant would likely have told the truth and not have cast himself, as he did later, as an eyewitness. Marshall's arrest would never have happened.

MacDonald testified that he did not usually take statements from witnesses until there was a suspect. It should not be necessary to have a suspect in order to take statements. MacDonald's practice in this respect exhibited a basic lack of understanding of police investigative procedures. A factual statement from a witness is just that. How can a suspect be identified until statements have been taken and information obtained? Surely, the most reliable statement is one taken while recollections are fresh. There is no satisfactory excuse for MacDonald not taking formal statements from Marshall and Chant that night at the hospital.

1.3.2 The MacIntyre investigation

There is conflicting evidence over how Sergeant of Detectives John MacIntyre was notified of the stabbing that night. MacIntyre testified that he was not feeling well and had gone to bed. He says he was awakened by a call from MacDonald, who advised him of the stabbing. MacDonald gave him the details as he knew them, and

MacIntyre says he told him to go as far as he could with the investigation that night, and to call him back if necessary.

MacDonald himself testified he had no contact with MacIntyre, and that Sergeant Len MacGillivray called MacIntyre after MacDonald returned to the police station at around 3 a.m. MacDonald's statement of May 11, 1982 to the RCMP, on the other hand, indicates that MacDonald did call MacIntyre. (Exhibit 99, Page 95)

The question of how he was first informed is not important to the outcome of subsequent events, but it is worth noting that the witnesses do agree that MacIntyre was notified of the stabbing within a few hours after it occurred, and that he did not come out to take personal charge of the investigation that night.

We do not believe MacIntyre can be faulted for that decision. However, while it was reasonable for him to instruct MacDonald to continue with the investigation during the night, one would certainly have expected MacDonald to report to MacIntyre on the results of that investigation first thing in the morning. It would have been grossly incompetent for MacIntyre, as the police officer in charge of the investigation, not to get an initial and complete briefing from the officer in charge of the early investigation.

MacDonald testified as follows:

Transcript, Page 1670

Q. ...Did you work the next day, that Saturday?
A. Yes, I was out at half past seven in the morning.
Q. Not much sleep?
A. No.
Q. Were you scheduled to work that Saturday?
A. No, sir.
Q. Why did you come out?
A. Well, it was the nature of the crime and I knew Sergeant MacIntyre would be out early and maybe other detectives. I'm not sure who came out. I know Sgt. MacIntyre did come out early in the morning, you know.

Transcript, Page 1672

Q. And when did you first speak to Sgt. MacIntyre about the case?
A. When he came out in the morning.
Q. Do you know how early that was?
A. It could have been close to eight thirty, nine o'clock.
Q. Eight thirty, nine o'clock, and where did you speak to him?
A. In the Detective Office.
Q. And what did you tell him?
A. I explained to him what took place. I read my report to him and I read this - this report here and from there we -
Q. You read over your notes?
A. Yes, sir.

MacIntyre, on the other hand, testified that:

Transcript, Page 5915

Q. Do you remember arriving [at the police station]?
A. I remember being down there, yeh.
Q. Okay. And what would you've done when you first arrived?
A. I would've looked at any reports that were there and talked to the police there.
Q. Would you have talked to MacDonald?
A. No, MacDonald - I didn't see MacDonald.
Q. You didn't see MacDonald?

A. No.
Q. Would you have not called him to find out what he did?
A. No, I didn't call him, no.
Q. But he was the man who had done the investigation the night before.
A. That's right.
Q. Did you have any written report from him?
A. No, I don't - No, I didn't have any. No.
Q. Well, how would you know what he did?
A. Well, I'd - I expected that he would be in touch with me.

Transcript, Page 5917

Q. ... MacDonald ... testified he made his own notes. Would those have been available - with you?
A. No, I didn't see those.
Q. In fact, I think he testified that he went over them with you.
A. No, I didn't see those, sir.
Q. But you don't recall that?
A. No. No.
Q. Have you ever seen his notes?
A. ...I don't recall seeing his notes, no.

The Royal Commission rejects MacIntyre's evidence on this point and finds that MacDonald did come to work on Saturday, his day off, and that he reviewed his notes with John MacIntyre.

1.3.3 MacIntyre assumes control

MacIntyre assumed conduct of the investigation on the morning of Saturday, May 29, 1971. He testified he reviewed the crime reports compiled on the previous shift after which "I think I left the police station and I went to the park area looking for clues over there". (Transcript, Page 5929)

Early on the morning of May 29, MacIntyre and Constable Ed McNeill, another Sydney police officer, spoke to Sergeant Murray Wood of the RCMP. Wood testified he had no independent recollection of this discussion, but he made detailed notes immediately following the discussion. His notes were introduced as Exhibit 40, and read, in part:

29-May-71
9:30 am - 11:00 am office & Sydney City Police Station Re: Stabbing in Wentworth Park early A.M. this date. Two youth Seal [sic] & Marshall.
Conversation with Edward MacNeil [sic] & Det. MacIntyre feeling at this time Marshall was responsible and incident happened as a result of argument between both Seal [sic] & Marshall.
Mentioned Rotary Park incident two weeks previous where knife was used. Thought at this time to be no connection.
Only description received from Marshall was a man 45/50 yrs. with grey hair.

Wood was unable to identify which of the two Sydney officers was the source of the information. Neither MacIntyre nor McNeill had any recollection of the conversation. McNeill did testify that he would not have expressed an opinion or offered a description in the presence of MacIntyre, the senior investigator, but would have let MacIntyre do the talking.

We believe MacIntyre did indeed provide this information to Wood. We have no doubt of the accuracy of Wood's notes, and the evidence of the relationship between the constables and the detectives of the Sydney City Police Department clearly establishes that constables took little initiative in searching for information and offering opinions to the detectives. This would apply even more so when they were dealing with the Sergeant of Detectives.

Two other points from Wood's notes bear noting. The first is his reference to a man "45/50 yrs. with grey hair". Nowhere in the Sydney City Police Department records from May 29 is there a description that refers to grey hair. Mroz's report (Exhibit 16, Page 10) refers to "a man in his mid-40's, very tall and having white hair." Dean's report (Exhibit 16, Page 4) refers to "a tall fellow with white hair and a short fellow." The only reference to grey hair is in Detective MacDonald's notes. While MacDonald's notes make no reference to age, it is a reasonable conclusion that the reference to "grey hair" in Wood's notes originated with MacDonald. This, in turn, supports our earlier conclusion that MacIntyre spoke to MacDonald before speaking to Wood.

Wood's notes also refer to a knife incident in Rotary Park in Sydney two weeks previously. The fact that MacIntyre and/or McNeill immediately concluded there was no connection between that incident and the Seale stabbing suggests that they had decided - without any evidence or investigation - that Marshall was responsible for the crime.

The information they gave to Wood is disturbing. Not only does it focus on Marshall as the person responsible, but it provides an invented context for the stabbing. According to Wood's note, "feeling at this time, Marshall was responsible and incident happened as a result of argument between both Seal [sic] and Marshall."

At this point, however, none of the information made available to MacIntyre suggested there was an argument between Marshall and Seale. The police reports indicate that Marshall was at the scene when the police arrived and that he himself had been stabbed. None of the police reports suggests Marshall was involved; on the contrary, the reports consistently indicate that the police officers at least initially accepted Marshall's explanation and undertook a search for the two men he described. M. R. MacDonald's notes set out Marshall's version of the stabbing, and the police report filed by Constables Johnston and McKenzie at 1 a.m. Saturday morning, May 29, (Exhibit 16, Page 6) confirms that Maynard Chant had been picked up and had stated that "he had seen what had happened". There was no suggestion that Chant had seen Marshall stab Seale or had heard them arguing.

Although MacIntyre said he had no knowledge at that time of any altercation between Seale and Marshall and said, "I hadn't made up my mind at that time" (Transcript, Page 5940), we believe MacIntyre had identified Marshall as the prime suspect by the morning of May 29 - less than 12 hours after the stabbing - and had surmised, if not concluded, that the stabbing arose out of an argument between Seale and Marshall.

None of this is to suggest it is unreasonable for police officers to surmise how a crime may have been committed and then be alert for evidence consistent with their theory of the case. What is not acceptable is for police officers to formulate a theory that has no evidence to support it and some evidence against it, and then to adopt that theory to the exclusion of any others. That is what John MacIntyre did, and by so doing, he compromised the objectivity and impartiality of the ensuing investigation.

Why did MacIntyre focus so quickly on Marshall? Ed McNeill testified the police department knew Marshall as a troublemaker and a tough kid. (Transcript, Page 2629) These factors, combined with the fact that he was present at the time of the stabbing, would not have helped Marshall's cause, McNeill said.

We also believe the fact that Marshall was a Native is one reason why MacIntyre singled him out so quickly as the prime suspect without any evidence to support his conclusion. We are convinced that if Marshall had been White, the investigation would have taken a different course. We have no direct evidence to support this belief. It is our opinion based on our observation of many of the witnesses who appeared before us.

A Native person in Sydney in 1971 was a member of a severely disadvantaged minority. Socializing between Natives and Whites on an equal footing was unknown in Sydney, and the police actively discouraged White girls from fraternizing with Native boys. We were left with the impression that many people in Sydney in 1971 believed Natives were not "worth" as much as Whites. Since a Native "troublemaker" would be worth that much less, Marshall's story scarcely merited consideration.

Regardless of his reasons, it is clear that MacIntyre regarded Marshall as a troublemaker. Emily Clemens, the mother of Joan Clemens, Marshall's girlfriend at the time, testified that MacIntyre had said prior to the stabbing incident that Marshall "would make the mistake sometime in the near future that he would probably ... get him - pick him up on it". (Transcript, Page 3475) Although we do not believe MacIntyre deliberately set out to convict Marshall while believing he was *not* guilty, that does not excuse his behavior.

MacIntyre's blind belief in Marshall's guilt dominated his conduct of the investigation and committed it to a course that was designed to seek out only evidence to support his theory. This "closed-mind" approach, stubbornly pursued, resulted in a flawed investigation, culminating in the charging of Marshall for the murder of Seale.

MacIntyre's direction of the beginning stages of his investigation - like the department's crime scene investigation the night before - was also inadequate and incomplete to the point of incompetence. For example, on May 29, 1971 the police investigation consisted of walking around the park, where police found a tissue with blood on it. Incredibly, however, they did not conduct any systematic canvass of the houses in the area where the incident took place. Questioning residents to find out if they saw or heard anything should not only be considered elementary police procedure, but might also have been especially relevant in light of MacIntyre's theory that the stabbing had been the result of an argument, during which there likely would have been raised voices. Despite that, the police took no statements and conducted no interviews. This continued failure to take statements, at least from Marshall and Chant, is astounding.

After MacIntyre assumed conduct of the investigation, the police made no attempt to locate the two men Marshall had described, or even to search through police records to determine if someone matching the descriptions given by Marshall had ever been convicted of any crime involving knives. In fairness, the Sydney City Police Department record system did not allow retrieval of names by type of offence. The records were filed by name, so a laborious card-by-card search would have been the only way of reviewing previous knife offences unless one knew the name of the person involved. Although Roy Ebsary had been convicted of carrying a concealed knife on April 9, 1970, and his record was filed under his name at the Sydney City Police Department, the only way for the police to have identified him would have been for a police officer to remember the incident and connect Ebsary with the description Marshall had given.

However, the Sydney City Police Department could have taken advantage of the more comprehensive resources available from the RCMP in conducting its investigation. The RCMP Identification Section could have provided such services as photography, fingerprint examination, planning and sketching and other related services. RCMP Staff Sergeant John Ryan, who was stationed in the Identification Section in Sydney from 1969 to 1972, testified he contacted either Detective MacIntyre or Detective Urquhart on Monday, May 31, 1971, and offered his services in their investigation. He testified he was told, "Not at this time." MacIntyre had no recollection of any call from Ryan, but did state the following:

Transcript, Page 5937

Q. Why wouldn't you accept his offer to get his expertise or the expertise of his section?
A. Well, I just didn't do it at that time. I didn't think - I thought I'd carry on myself.
Q. And what were you going to do from an Ident point of view?
A. From an Ident point of view?
Q. Yeh?
A. Well, there was nothing there to do it except to look for the weapon at that time. I had the scene drawn by the City Engineer's Department a couple of days -

The Sydney City Police should have made immediate use of the resources offered by the RCMP. Indeed, they should not have waited for the RCMP to offer, but should have initiated the request themselves. Nothing relevant may have surfaced, but a thorough examination and recording of the crime scene should be considered as a basic element of any police investigation.

Apparently on its own initiative, the RCMP did take some interest in the case. Early in the investigation, officers looked for the white Volkswagen with two men in it that John Pratico had referred to in his May 30 statement to police (about which we will have more to say shortly). An RCMP officer also accompanied MacIntyre to New Waterford in connection with the investigation. And, on Sunday, May 30, 1971 at 3:11 a.m., the RCMP General Investigation Section (GIS) in Sydney did send a telex to division headquarters in Halifax. The telex, directed to Maritime Crime Index Record System (MCIS), includes the following:

Exhibit 16, Page 90

> ...Circumstances presently being investigated by Sydney PD investigation to date reveals Marshall possibly the person responsible however Marshall states he and deceased were assaulted by an unknown male approx 5'8 to 6' tall grey hair approx 50 yrs who stated he did not like indians or negroes and assaulted both persons with a large knife. Search of the area failed to produce the weapon involved. May records be checked for person(s) in Sydney met area using similar type MO with photos etc fwd to NCO I/C Sydney Det.
> Sydney Det.

None of the Sydney City Police Department and RCMP witnesses we questioned about this telex was able to shed any light on how it originated or whether there was a response. If there was, it has not been found.

Given that the Sydney City Police turned down an RCMP offer of identification services, and that there is no evidence any Sydney police officers even considered a records check, we believe the Sydney RCMP probably forwarded this telex on its own initiative. The telex confirmed that the investigation was being conducted by the Sydney City Police Department and that Marshall was "possibly the person responsible". The descriptive information is more detailed than in Sergeant Wood's notes, leading to the conclusion that the RCMP had received additional information from the Sydney City Police Department.

There is a strong similarity between the information contained in the telex and in the statement Donald Marshall, Jr. gave to police at 4:50 p.m. on May 30, 1971. (Exhibit 16, Page 17) The reference to "not liking indians and negroes" and the description of the assailant correspond closely. MacIntyre testified he spoke to Marshall at various times on Saturday, May 29, and we believe Marshall told him this general information during these discussions. MacIntyre also testified that he was at the Sydney police station until very late Saturday night. We believe MacIntyre must have given this information to the RCMP some time during the night of May 29. The triggering event for the RCMP telex was likely Seale's death, which transformed the stabbing into a murder.

1.3.4 Seale's death

Sandy Seale died early in the evening of May 29. At the time of his death, he had been in hospital for almost 20 hours and had undergone two operations.

No autopsy was ordered, nor was one required by law. The likelihood that an autopsy would have provided any information concerning the circumstances of the incident may have been slim, but we believe an autopsy should have been performed anyway, not so much to determine the cause of death, but to see if there was any forensic information that might assist in establishing the circumstances surrounding the death.

If the police had ordered an autopsy, its results, coupled with a detailed physical examination of Seale when he was admitted, might have helped determine whether there had been a fight, the precise nature of the wound and whether Seale had been drinking. No one could have known at the time whether such information would be relevant. In hindsight, it probably was not, but that does not change the fact that a thorough investigation of a murder or potential murder requires a competent forensic autopsy of the victim.

1.3.5 May-June, 1971 statements

Between May 30 and June 4, police searched the park area and attempted to drain the pond in Wentworth Park in a fruitless effort to find the murder weapon. They also interviewed a number of persons and took some statements.

The first statement taken in the investigation was taken from Marshall at 4:50 p.m., Sunday, May 30. The statement read:

Exhibit 16, Page 17

1971
May 30 - 4:50 P.M.
Statement of Donald John Marshall, age 17 yrs., residing at 38 MicMac St., Sydney - About 12 P.M., Friday night, I came through the park from the direction of George St. near the tracks. I met Sandy Seale in the park coming towards me. We walked together. We met Bob Patterson. He was drunk. We asked him if he knew us and he called us by name. We told him to sit down. We started to walk to the bridge. We stood there for a few seconds; 2 men whom we did not know called us up from Crescent St. They asked us for 2 cigarettes. I gave them to them: also a book of matches. The old guy started to talk to me about women. I said lots of them in the park; also they wanted to know where a bootlegger was.
I asked them where they were from and they said Manitoba. I asked then if you guys are priests and the tall fellow said we are. One fellow had a long blue coat on. They told us we don't like coloured people and Indians. The old guy turned to Sandy and said there is one for you black boy and he put the knife in his stomach. He then took the knife out of Sandy and swung at me and put it in my left arm. He told me there is one for you too Indian.
I stood for 2 seconds and then I ran for help.
They both ran away up back of a green house. I circled around and got help. The police were called and the ambulance.
Q. Did you know these fellows
A. No
Q. Did you ever see them before
A. No

Q. Describe these fellows to me

A. 1 fellow - the small fellow was 5-9-10 - 190 lbs hair - grey combed back. Wore glasses (black rimmed) age 50 yrs. Long wide face. Long blue coat; dark blue sweater; black shoes-rounded toes.
The other fellow - brown cordoroy short coat - 5-11 - 150 - hair-black. Short hair - age 35 yrs - he was wearing a blue sweater too - V neck sweater with buttons - both of them - thin faces.

Signed: Donald Marshall
May 30th-5:12 P.M.
Sergt. Det. J. F. MacIntyre

The descriptions provided by Marshall in his statement corresponded to those he had given Sergeant MacDonald the night of the stabbing.

Maynard Chant's statement, taken at 5:15 p.m. on May 30, 1971, suggested that Chant had been walking across the railway tracks in Wentworth Park when:

Exhibit 16, Page 18

> ... I seen 2 fellows walking and 2 more walking kind of slow talking. The 2 fellows who stabbed Donald Marshall and Sandy Seale - they talked for a few minutes over on Crescent St. One fellow hauled a knife from his pocket and stabbed one of the fellow - so I took off back across the tracks to Byng Avenue and started to walk toward the bus terminal. Then I seen Donald Marshall coming down. I turned around and started to walk the other way. Donald caught up me and said look what they did to me. He showed me a long cut on his left arm. Then he said help me - my Buddy is over on the other side of the park with a knife in his stomach. Then we started to look for more help. We met some boys and girls - one of the girls gave Donald a handkerchief - we got a car to take us over to where Seale was lying on the pavement. I took my shirt and put it around his waist and Donald went to a grey house and asked the man if he would call an ambulance.

John Pratico's statement, taken 45 minutes later at 6 p.m., says that he left the dance at about midnight and briefly met up with Marshall and Seale. After he left them:

Exhibit 16, Page 22

> I went down Argyle St. and went over Crescent St. I was over by the Court house when I heard a scream. I looked. I seen 2 fellows running from the direction of the screaming.

Both Chant and Pratico also gave descriptions of two men. These differed markedly. Pratico said, "one had a brown corduroy jacket - 5'5", dark complexion, heavy set. The other, grey suit, about 6' tall; husky; red sweater - like a pullover." Chant said, "one man about 6'2" - light brown hair; dark pants; suit coat - over 200 lbs. The other fellow 6' tall - dark pants; dark hair - 165 lbs."

Chant testified that he concocted the story about the two men after he saw Marshall at the police station in the late afternoon on Sunday, May 30. (Transcript, Page 818) He remembered Marshall appearing angry and saying to Chant: "There were two of them, wasn't there?" Chant said that he was frightened by Marshall's appearance and demeanor. When questioned about the detailed description of the event and his route contained in the statement, Chant testified that he had "conjured" it up to make his story believable. He stated that once he had agreed with Marshall that there were two of them, he felt he had to stick with this story.

Transcript, Page 830

Q. What was to stop you from saying Mr. Marshall said there was two and simply leaving it at that?
A. I don't know. I'll be honest with you, the only thing I can say is I felt pressured myself and -
Q. You felt pressured?
A. I felt pressured by what he - When he said that I was scared. I felt pressured.
Q. Where was that pressure coming from?
A. From -
Q. From him?
A. - within
Q. From yourself?
A. Yeh, I felt pressured within myself, but I - as I stated before that the way - because of his appearance and because of the way he said it that I felt - I was scared and it caused me to say, 'yes,' that there was two of them, and then realizing what I had done I realized that I would have to - that this particular statement I would have to give reference to that if I said that I had saw two men then I would have to give a statement in reference to saying that I had saw two men.

There is no firm evidence about how or why Pratico was interviewed on May 30. A 16-year-old youth, he was at the time a patient of Dr. M. A. Mian, a Sydney psychiatrist who had diagnosed him as a schizophrenic with a "rather childish desire to be in the limelight or centre of attention". On Saturday, May 29, Pratico was with two other youths, Rudy Poirier and Glen Lamson, outside Poirier's house on Bentinck Street when Marshall came by and told them what had happened in the park. Pratico was subsequently interviewed by the police and signed a statement on May 30 at 6 p.m.

In his statement, Pratico said he had heard screaming and saw two men running away from the stabbing scene and jumping into a white Volkswagen. He said he had seen the men at the dance earlier, and that a man named Robert (Bobby) Patterson had told him they were from a Toronto bike gang.

When Pratico testified before the Commission, he was not an impressive or reliable witness. He said he had no recollection where the information in his May 30 statement came from.

On Monday, May 31, police took a joint statement from George and Alexander (Sandy) MacNeil, two teenagers at the dance:

Exhibit 16, Page 26

1971
May 31st, 6:30 P.M.
Statement of George Wallace McNeil, 18 yrs., 91 Bungalow Road and Roderick Alexander McNeil, 17 yrs., 84 Bungalow Road, Coxheath.
We left the dance at St. Joseph's Hall, Friday night 11:40 P.M. We walked through the park and seen 2 men hanging around. Description as follows:
1 man - grey haired; grey or white top coat - 5-9 W. 180 lbs. hair flat on his head. no wave - straight back - round fat face trampish looking - late 50's
2nd man - tall 6 ft. or better thin [sic] average size - dark hair - late 30 or early 40 yrs - thin face, brown jacket - short.
They spoke to a fellow and girl sitting on a bench closest to the railroad tracks as you came over the hill. They asked them for a cigarette. The grey haired fellow said he had just a dollar. We kept on home. We called at Fatima at a school dance on the way home.

Q. Did you know Sandy Seale
A. Yes, to see him
Q. You seen him at the dance hall that night
A. Yes
Q. He was there when you left
A. Yes. He was outside of the hall - all the tickets were sold early.
Q. Would you know them again
A. We don't know.

Signed: George McNeil
Sandy McNeil

This confirmed the presence in the park of two men generally answering the descriptions of MacNeil and Ebsary, and gave MacIntyre descriptions which corresponded to those provided by Marshall.

MacIntyre's failure to pursue this corroborative information from two disinterested witnesses confirms our view that he was only prepared to consider information consistent with his own theory of the stabbing. In his affidavit filed in connection with the 1982 Reference, MacIntyre acknowledged the relevance of the MacNeils' statement, but said "the statement appeared at that time to have been superseded in importance by those subsequently taken from" Chant, Pratico and Harriss.

Early in the week MacIntyre visited Wentworth Park. He suspected that Marshall had provided the information Pratico gave in his first statement, and testified that he visited the park late at night and "I walked that area there to see what I could see and what Pratico told me he could see".

Transcript, Page 6081

Q. ... what was the purpose of that visit?
A. ... it was my thinking that he [Pratico] couldn't see what he did see over by the court house when he said he'd heard those screams and seen this - those people jump into a Volkswagen and what have you, that he couldn't see it from that - the distance he was at and I thought I should have another talk to him.

As a result of his visit to the park, MacIntyre decided Pratico was not telling the truth and should be re-interviewed. In our view, that decision was justified. Given the location where Pratico claimed to be in his statement and the location of the stabbing, he likely could not have seen the activity referred to in his statement.

Pratico's second statement was as follows:

Exhibit 16, Page 41

June 4, 1971
10:45 A.M.
Statement of John Louis Pratico, age 16 yrs., residing at 201 Bentinck St., Sydney. Last Friday night I went to the dance at St. Joseph's Hall, George St., Sydney. I went with Bobbie Christmas; Donald Gordon and I met Bob Janes from Alexander St. there. He gave me money to get in. This was about 9:30 P.M. I was at the dance till about 10 or 5 to 12. Then I walked out by myself.
I met Donald Marshall and Sandy Seale. We walked to the corner of Argyle St. Donald said John come down to the Park in a rough voice. I said No. I went down Argyle St. and over Crescent St. I was walking on the park side. I seen Sandy and Donald on the other side of the bridge stopped. I did not pay much attention to them. I kept walking for the tracks. On the tracks, I stopped where I showed you. Then Donald Marshall and

Sandy Seale were up where the incident happened. I heard Sandy say to Junior, you crazy Indian and then Junior called him a black bastard. They were standing at this time where the incident happened. They were still arguing. They were talking low. I could not make out what they were saying.

Q. Which way was Sandy Seale facing
A. Facing the tracks
Q. Which way was Donald Marshall facing
A. The street
Q. How close were they
A. Arms length
Q. What did you see or hear next
A. I did not hear. I just seen Doald [sic] Marshall's hand going towards the left hand side of Seale's stomach. He drove his hand in - turned it and pulled it back.
Q. What happened then
A. I seen Sandy fall to the ground and Donald Marshall running up Crescent St. towards Argyle St.
Q. What did you do
A. I run home up Bentinck St
Q. Were you standing on the track at the time Sandy Seale fell to the ground
A. Yes. I was
Q. Why were you standing there
A. I was drinking a pt. of beer
Q. Was there anybody else around the scene
A. Nobody - not a soul
Q. Did Seale scream when Donald Marshall struck him in the stomach
A. He screamed - aah
Q. How long did you know Sandy Seale
A. 4 or 5 years
Q. How long did you know Donald Jr. Marshall
A. Since last summer
Q. Did you ever quarrell [sic] with either boy
A. No
Q. Were you talking to Sandy Seale at the dance
A. Yes outside about 10:30 P.M.
Q. How far away would you be from Sandy Seale and Donald Marshall when they were on Crescent St.
A. 30 to 40 feet
Q. How long were they standing there
A. About ten minutes. They were arguing over something
Q. How is it you did not come down where they were at
A. I was scared
Q. Did they notice you on the tracks
A. I don't know
Q. Would there be any obstruction between you and Sandy Seale and Donald Marshall when you were on the tracks from them seeing you
A. Bushes between them and me - blocking the view on them. It was easier for me to see them
Q. Did you see Donald Marshall since
A. Yes. Saturday or Sunday.

Pratico testified that in the course of questioning him, MacIntyre told him "we have a witness saying you were in the park that night." MacIntyre denied this. Pratico also testified MacIntyre told him that, if he didn't tell the truth, he would go to jail. MacIntyre denied this.

In his testimony, MacIntyre initially told the Commission he had not spoken to Pratico between the time of his May 30 statement and the one taken on June 4.

Transcript, Page 6115

Q. Had you seen him since you had taken the statement on May 30 until he was brought to your office on June 4, which was a Friday?
A. No. No.
Q. So this was your first contact with him from the first statement until the second. And you told him, "I don't think you" or words to this effect: "You weren't telling me the truth before, I want the truth?"
A. That's right, yes. Some words to that effect.

We have concluded that MacIntyre was not telling the truth when he made this denial. Pratico's statement includes the statement - "On the tracks, I stopped where I showed you" - indicating that MacIntyre had been with Pratico in the park before the statement was taken. When MacIntyre was asked about this, he reluctantly agreed that he must have been in the park with Pratico prior to June 4:

Transcript, Page 6119

Q. ... what does he mean, "where he showed you?"
A. Well, I have no recollection of - of picking him up, but I would say that that must have - that he must have showed me where he was standing and I must have been in the car. I don't know.
Q. You must have been in the park with him?
A. No, but I mean, "I stopped where I showed you."
Q. He stopped on the tracks, "where I showed you?"
A. Yeh, yeh.
Q. He must have showed you where he stopped in the tracks?
A. Yeh, that's what I'm saying.
Q. So when were you in the park with him?
A. It must have been the morning he was picked up.
Q. Did you pick him up?
A. I've - I've no recollection of it at this time.
Q. Mr. Pratico testified on page 2128, and this is in response to questions from Ms. Edwardh:

> '...I went to the park with them after after the first statement ...' 'Okay, that's what I wanted to ... draw (to) your attention. So let's talk about the time you went to the park before you gave this second statement. Okay, and do you recall who you went to the park with on that ... occasion? Who was that?' 'Sergeant MacIntyre.'

Did you take him to the park?
A. I would say that I was over at - must have been over at the park with him, although I got no recollection of it.
Q. ... And you and Pratico were together in the park before he gave you this second statement, isn't that correct?
A. I would say by this statement that I must have been. Although I have no recollection of it now. That's what I said.
Q. ... Did you walk about the park with him?
A. Yes.
Q. Did he take you to the place on the tracks that he 'showed' you?
A. I know where he was supposed to be on the tracks.
Q. Where?
A. I think it was the - the bush in front of the second house.
Q. How do you know where he was supposed to be?
A. I - he says, "I stopped where I showed you," so -
Q. I know he says that, but you just said you knew where he was "supposed" to be. How did you know where he was supposed to be?
A. I'm saying I have no recollection of it now; but he must have taken me over there. That's as far as I can go on that, Mr. MacDonald.
Q. So you must have been in the park with him then?
A. Well, I could have been, but I don't, you know, I have no recollection of it right now.

We now know that Pratico's June 4 statement is not true. We believe Pratico's June 4 statement resulted from suggestions MacIntyre made to Pratico, and that those suggestions were designed to conform with the theory MacIntyre had formed early on May 29. There is no explanation for Pratico's statement other than that suggestions made by MacIntyre to Pratico were accepted by Pratico.

Pratico not only said that Marshall stabbed Seale, but also that the stabbing occurred during the course of an argument. Both of these statements were untrue.

MacIntyre himself had first raised the idea of an argument in his conversation with Sergeant Wood of the RCMP on May 29, and the reference to it in Pratico's June 4 statement is the first time it had been referred to in any statement.

Pratico's knowledge of where the stabbing occurred, as well as the fact that the statement places Pratico on the tracks, could only have come from MacIntyre suggesting to and showing Pratico where he would have had to be in order to see the stabbing. In addition, Pratico's statement that Marshall stabbed Seale could also only have been provided by MacIntyre.

At the time MacIntyre took this statement, the fact that Pratico was not mentally stable was well-known and apparent to his friends, and should have been apparent to any observant person interviewing him. Pratico was known to fantasize and to invent stories to make himself the centre of attention. Dr. Mian, a psychiatrist who treated Pratico from 1972 on, and who had reviewed his prior medical history, testified that Pratico was also extremely susceptible to suggestion, particularly from any adult in a position of authority.

It is reprehensible for a police officer to take an unstable and impressionable teenager to a murder scene, review the scene with him, and then persuade him to accept suggestions which form the basis for a detailed and incriminating statement.

1.3.6 Chant's second statement

After obtaining Pratico's "eyewitness" statement, MacIntyre and a fellow Sydney City Police officer, Detective William Urquhart, who assisted him throughout the investigation, journeyed to Louisbourg to re-interview Maynard Chant. Given the contradictions in the statements then in the hands of the police, this decision was justified.

The officers enlisted the help of Louisbourg Police Chief Wayne Magee to find Chant and bring him to the Louisbourg Town Hall. Chant's mother, Urquhart, MacIntyre, Magee and Lawrence Burke, Chant's probation officer, were all present at the time of the interview. (In his testimony, Burke questioned whether he was actually present, but the preponderance of evidence suggests he was.)

There is also dispute on the more important question of whether Mrs. Chant was present for the entire interview. Both Maynard Chant and Mrs. Chant insisted MacIntyre asked her to leave during the interview and that she did so. On the other hand, MacIntyre, Urquhart and Magee were all equally insistent she was present throughout. We believe Mrs. Chant was, in fact, asked to leave and did so. Since it was a unique experience for them, the Chants' memories would be more reliable than those of the police officers.

There is also other evidence to suggest that MacIntyre preferred as a matter of practice to question juveniles in the absence of their parents. Eunice Harriss, the mother of Patricia Harriss, testified that MacIntyre asked her to leave the interview room while he was interviewing her daughter because Patricia was not cooperating. (Transcript, Page 2956) Emily Clemens, the mother of Joan Clemens, also testified that, when MacIntyre earlier questioned her daughter with respect to a matter unrelated to the death of Sandy Seale, she was left with the impression that she should wait outside the interview room. When she later entered the room because she felt her daughter was getting upset, MacIntyre told her to sit down and be quiet.

We believe it was unacceptable for MacIntyre to ask Mrs. Chant to leave; however, that was far from the only aspect of MacIntyre's interview of Chant that we find offensive.

The interview was conducted in an oppressive manner. Chant testified MacIntyre's forceful tactics - including "leaning over the table" (Transcript, Page 960), moving up and down the length of the table, and talking in a loud and persistent tone - reduced him to tears. MacIntyre, Urquhart and Magee all denied Chant cried at any time during the interview. We do not accept their testimony. Magee testified that he believed the interview was conducted in accordance with good police practice and that it was neither threatening nor intimidating in any way. We do not accept Magee's conclusion. Magee was a fellow police officer and can reasonably be assumed to have some sympathy for the task facing MacIntyre. The use of tactics that a 14-year-old may reasonably perceive as intimidating is improper. Police officers questioning witnesses must strike a balance between their desire to get the truth and the need to be sure that the story they are being told is the witness's own, and that it is told without coercion or intimidation. The pursuit of truth is not the only value held dear by a civilized justice system; so too is freedom from coercion, threats and arbitrary action from those in authority.

As a result of the interview, Chant signed a statement in which he identified Marshall as the assailant. This statement was as follows:

Exhibit 16, Page 50

June 4th, 1971 - 2:55 P.M.
Statement of Maynard Vincent Chant age 14 yrs. residing at Main St. Louisbourg C.B.
Last Friday night after 11.30 P.M., I left the Acadian Lines on Bentinck St. and walked down Bentinck St. to the tracks. Then I started down the tracks towards George St. I noticed a dark haired fellow sort of hiding in the bushes about opp. the second house on Crescent St.

Q. Did you know him

A. No. I did not know his name but I seen him before out at the dances at Louisbourg.

Q. Did you see him since

A. Sunday afternoon at the Police office in Sydney. I walked by this fellow on the track I looked back to see what he was looking at. Then I saw 2 fellows standing about 1 1/2 ft from each other on Crescent St near the house with the railing up the middle of the steps. The same house which I called the police from. An old man with grey hair and glasses answered the door.

Q. Were they the same size

A. One was taller than the other

Q. Which one was facing you

A. Short dark fellow was facing the tracks. The taller man was facing the houses

Q. At this pt. did you recognize either of these men

A. The only man I recognized was Marshall

Q. What was he wearing

A. Dark pants and I think a yellow shirt with the sleeves up to the elbows I wish to say that when he was arguing I mean Donald Marshall with the other man his sleeves were down to his wrist at that time.

Q. How long were you on the tracks watching them

A. About 5 minutes

Q. Could you hear what they were talking about

A. No. I just heard a mumbling of swearing. I think Marshall was the one who was doing most of the swearing. Then I seen Marshall haul a knife from his pocket and jab the other fellow with it in the side of the stomach.

Q. What side

A. The right side I seen him jab it in and slit it down

Q. How could you tell it was a knife

A. By the figure of it it was shiny and long

Q. What happened then

A. When Marshall drove the knife in Seale he bent over. Then I ran toward George St. down the tracks I went into the Park through the Park then up to George St. crossed the tracks and then on to Byng Ave about 3 houses over I met Donald Marshall and he said look at my arm. It was his left arm his sleeve was up. The cut was on the inside of his arm it was not a deep cut and it was not bleeding at that time until we caught up to 2 boys & 2 girls who were walking. Donald said could you help us. One of the fellows said what is wrong. Then he said look what they done to me.

Then the other guy said "who" and Donald Marshall said the 2 fellows. He said my buddy is on the other side of the Park with a knife in his stomach. Then they said they would try and help us. At the time a car came along. and Donald stopped it and we asked for help. They picked us up and drove to the other side of the Park and we stopped about 6 ft. away from Seale. At this time Seale was lying on the opp. side of the street. Donald Marshall got out. came over near the body of Seale and stood there. Their [sic] was another man came along and knelt by Seale and then went over to a house and called an ambulance. Then he came back and knelt along side of me about 5 minutes. I asked this dark haired fellow to look after Seale while I went up and called again. I forget [sic] to state that the minute I got to Seale I put my white shirt on his stomach. I said hold it and he mumbled. Police and ambulance arrived and he was taken to hospital.

Q. Did Donald Marshall call the police or ambulance at any time

A. No

Q. Did you

A. Yes. first at the house with the railing coming down the centre of the steps

Q. Who was with you

A. Marshall stayed on the sidewalk

Q. Was there any other conversation between you & Marshall at that time

A. He said there were 2 men tall one had brown hair done the stabbing

Q. This of course is not true

A. No

Q. Did he know you were on the tracks

A. No he did not

Chant, MacIntyre and Urquhart each signed every page of the statement, and MacIntyre wrote the names of all present on a final page, which was attached to the rest of the handwritten pages. Magee, Burke and Mrs. Chant did not sign the statement.

In the above statement, Chant goes into detail about the route he took through the park, about observing "a dark-haired fellow sort of hiding in the bushes", about hearing an argument and swearing, and about seeing Marshall stab Seale. These assertions were false.

When questioned by Commission counsel about the source of the information in his statement, Chant said he made it up. When questioned in particular about the route he described having taken, which brought him back to Mattson's house on Byng Avenue (where he did, in fact, meet Marshall), Chant testified he invented this particular route to make his story believable.

Transcript, Page 872

Q. Do you have any recollection at all of why you changed your route when it came to this statement?
A. Well ... in order to witness the ... thing that was committed on that evening I would - by being down at ... this part of the tracks, I wouldn't be able to see anything that was happening up over the other side.
Q. Did you figure that out for yourself?
A. Probably.

Chant could offer no explanation for the reference to the "dark-haired fellow" in the bushes (presumably Pratico, who is dark-haired, but who, in fact, was not there), nor could he give any reason for having identified Marshall as the assailant.

He testified that he tried at the beginning of the interview to say that he "saw nothing", but MacIntyre told him there was a witness there who saw him and that he had to have seen something.

Transcript, Page 855

Q. And you say that Detective MacIntyre was standing up?
A. Yes.... he was explaining to me that the statement that I had given - that he believed that it wasn't true, and he was asking me if I knew anything else. And I remember my mother telling me to tell the truth. So at one point in time through the questioning, they had told me that ... they had a witness there that had told a story, and he said that he saw me there. And that I had seen what he had seen regarding ... the incident that had happened that night on May the 30th.
Q. You have a recollection now of being told that during that interview?
A. Yes.
Q. Do you recall who told you that there was a witness there had seen you?
A. They never told me who.
Q. No, but do you recall which of those present at the interview told you?
A. I believe it was MacIntyre.

Transcript, Page 866

A. So I was just sitting back taking it all in what he was saying and I remember ... saying, 'well, what did he say that I seen.'

Chant could not remember what assistance, if any, MacIntyre provided, but he did say he believed any information MacIntyre did provide was more to assist him than to pressure him to give particular answers.

Transcript, Page 878

A. What I want to say is that I really don't know.... I really can't remember to the effect of how ... the statements really came forth. Possibly I could have sought some help on it. Possibly I could have dreamed it up.

Transcript, Page 982

A. I just thought that they were trying to give me accurate conclusions to what happened that I could say in court.

On the other hand, Magee testified that MacIntyre would offer suggestions to Chant about what might have happened and what Chant might have seen:

Transcript, Page 3634

A. I - Detective MacIntyre conveyed to Maynard that certain information in a prior statement did not correspond with other information that they had obtained afterwards and that they wanted more or less some clarification pertaining to the first - first statement. And he then put questions to Maynard and wrote the answers down.

Transcript, Page 3648

A. … it was outlined, the circumstances of the stabbing and the location etc., but … I can't recall any specific questioning.
Q. When you say it was outlined, the circumstances of the stabbing, how was that outlined?
A. I think Mr. Chant was advised that well, the bridge is here and the bandshell is there and this one was supposed to be here. That sort of dialogue was going on between them.
Q. Okay. If I understand you correctly, and please correct me if I'm wrong, was there a sort of a scene painted for Maynard so that he could put himself into it?
A. I don't think that would - that that was the case. I believe that Maynard was - he might have been getting confused and he was given advice as to well, you know, this one in this statement didn't say that. You know, what's the situation here or there. It's - I can't recall the specifics of it but I'm - you know, that was the gist of it. They were - there may be five minutes or two minutes or a minute-and-a-half of questioning before an answer was written down.

Transcript, Page 3688

Q. … Was Maynard looking for assistance in completing his statement or in giving his answers?
A. I think that would be a fair assessment, yes.
Q. And did Sergeant MacIntyre provide that assistance?
A. He would render - He would render where the walkway was in reference to where the clump of bushes was, you know, in direction, this sort of this [sic].
Q. And was there -
A. It was a very, as I recall, a very casual conversation.
Q. Was there any assistance rendered as to where Maynard was on the walkway or where he was on the railroad tracks?
A. I don't - - I don't recall that specifically, no.
Q. Was there any assistance rendered as to what Maynard could have seen or could not have seen from any particular location in the park?
A. That's possible. I don't recall that, but it's possible.
Q. I see, and is it your recollection that after this assistance was given, on occasion that an answer would then be written down?
A. Yes.

MacIntyre denied telling Chant that "we have somebody who saw you there". MacIntyre also denied telling Chant that Chant's story was inconsistent with that of another witness. MacIntyre testified that no suggestions were made to Chant, and that the statement was completed in question and answer form without discussion between questions. MacIntyre's testimony on this point is contradicted by the testimony of Chant, Mrs. Chant and Wayne Magee. We have concluded that MacIntyre in fact told Chant that there was another person in the park who had seen Chant there. MacIntyre had nothing to support this assertion. In fact, it was directly contrary to Pratico's statement that nobody else - "not a soul" - was around the scene.

For Chant to have come up with a story that not only coincided with Pratico's but also included a description of a dark-haired fellow at the scene is beyond belief. Since there is no evidence that Chant and Pratico had had any contact prior to June 4, and since Chant - who was already on probation, and was now faced with having lied to the police in his May 30 statement - had good reason to want to satisfy the police, it is only logical to conclude that MacIntyre provided Chant with this information.

We reject MacIntyre's evidence that no suggestions were made and conclude that MacIntyre provided the references in Chant's statement to a dark-haired fellow in the bushes, to an argument, and to Marshall stabbing Seale. Chant told the police what he thought they wanted to hear and, in fact, was only repeating what he had been told by MacIntyre. As with Pratico, Chant was a vulnerable teenager who was easily led.

MacIntyre knew very well the importance of his "eyewitnesses" and their June 4 statements. Pratico provided the first statement on June 4. Chant's statement, taken shortly thereafter, placed "a dark-haired fellow sort of hiding in the bushes". Chant said he "walked by this fellow on the tracks". Pratico had said in his June 4 statement that he was "on the tracks". Both of them, according to their statements, observed Marshall stab Seale. None of this was true, but MacIntyre now had not only two eyewitnesses but two eyewitness statements that were generally consistent. As MacIntyre himself admitted in his testimony before the Royal Commission, he was the only common link between the two statements.

Transcript, Page 6677

Q. There was only one common denominator then between those two people, Chief?
A. What's that?
Q. Was that the person who took the statements both times. Yourself.
A. That's correct.

It was completely wrong for MacIntyre to suggest a set of facts to Pratico. It was outrageous for him to suggest a corresponding set of facts to Chant and to then go even further by placing Pratico within Chant's line of sight to ensure the consistency of the two untrue statements. It is highly improper police investigative practice to obtain any statement, let alone a statement from an "eyewitness" to a murder, by misleading the witness and by making detailed suggestions which conform with the investigator's theory of the crime. Indeed, MacIntyre's obtaining of Chant's statement goes beyond improper practice. In our view, it must be seen as purposeful action on the part of MacIntyre intended to extract from Chant a story consistent with that of Pratico. In order to get this statement, MacIntyre was prepared to tell Chant what he knew was not true, that is, that the police had a witness who had seen Chant in the park.

Based on the "eyewitness" statements of Pratico and Chant, Marshall was arrested and charged on June 4, 1971. These statements, obtained through improper police practice, played a significant role in Marshall's wrongful conviction.

1.3.7 Patricia Harriss' statements

Although Patricia Harriss was with Terry Gushue in Wentworth Park on the night of the stabbing, and although the two of them met Marshall and Seale shortly before the murder, she was not asked to give a statement to the police until June 17.

At the request of the police, Eunice Harriss, Patricia's mother, brought her daughter to the police station early that evening. Eunice Harriss testified she stayed at the police station throughout her daughter's interview and that Patricia was initially interviewed by both Urquhart and MacIntyre. Mrs. Harriss said she knew MacIntyre from previous association and recognized Urquhart from newspaper pictures.

The police officers took two statements from Harriss that night - the first an incomplete, unsigned statement in Urquhart's handwriting, which was begun at 8:15 p.m. on June 17 (Exhibit 16, Page 64); the second, a signed statement taken by MacIntyre, which was begun at 12:07 a.m. on June 18. (Exhibit 16, Page 67) Urquhart's name appears as a witness on the typed version of this second statement, but does not appear on the original.

Neither Harriss nor Urquhart could offer any satisfactory explanation why her first statement, which we will refer to as Harriss #1, was incomplete and unsigned. It reads as follows:

Exhibit 16, Page 64

June 17, 1971 - 8:15 P.M.
Statement of Patricia Harris [sic], 5 Kings Road,
Born: 1957 - Nov - 15

On the night of the dance at St. Joseph's, May 28, 1971, my boyfriend Terry Gushue, 2 Tulip Terrace, left the dance at 11:45 P.M. We sat on a bench near the Bandstand. Robert Patterson was on the grass sick, throwing up. We smoked a cigarette. Terry and I left, walked back of the Band Shell on to Crescent Street in front of the big green building. We saw and talked to Junior Marshall. With Marshall was two other men.

Q. Describe the other men to me?
A. One man was short with a long coat. Gray or white hair, with a long coat. I was talking to Junior. Terry got a match from Junior and Junior said they are crazy. They were asking him, Junior, for a cigarette.
Q. Did you see Sandy Seale in the Park?
A. No.
Q. Was there anyone else in the Park?
A. Yes, boys and girls walking through the Park. Gussie Dobbin and Kenny Barrow, they left while we were still on the bench.

Between the taking of this first statement and the beginning of the second statement, MacIntyre also took a statement from Harriss' boyfriend, Terry Gushue, at 11:40 p.m. (Exhibit 16, Page 69) In it, Gushue said he was with Patricia Harriss on the night of the stabbing and saw Marshall on Crescent Street with one other man whom he did not know. He got a light from Marshall and left.

Gushue was allowed to see Harriss for a few minutes during the evening of June 17. Harriss' testimony about this meeting in her 1984 Examination for Discovery (in connection with a law suit filed by John MacIntyre against the CBC for comments about the

Marshall case) indicates her feelings about MacIntyre's questioning of her that night.

Exhibit 13, Page 148

A. At one point they allowed my friend [Terry Gushue] to come in and see me ... I was awful upset, I was crying, whatever, and he came in to try and make me feel better and I think at that time we decided we'll just go along with whatever ...

Patricia Harriss' second statement (Harriss #2) was completed at 12:25 a.m. on June 18. Although this statement was also taken by MacIntyre, Urquhart's name appears on the typed versions of both the Gushue and second Harriss statements, but not on the originals. Urquhart testified that if he were present, he would invariably have signed the original.

The typed version of the second statement - Harriss #2 - reads as follows:

Exhibit 16, Page 65

June 18th - 1:20 a.m.
Statement of Patricia Ann Harris [sic], age 14 yrs., residing at 5 Kings Road, Sydney. On May 28th, 1971, I went to St. Joseph's Dance Hall. I met Terry Gushue there. We danced for awhile and then a fight started. Terry got mixed up in it and he was asked to leave. So I went with him. I got mad at him for drinking & fighting. We went to the Park and sat on a bench and started arguing. Robert Patterson came to the Park with us. After a while, we crossed the park back of the bandshell. Then we went up to Crescent St. and by the green apt. building, we met Jr. Marshall. Terry got a match of [sic] him.

Q. Was there anybody with Jr. Marshall
A. Yes
Q. Who was it
A. He had a dark jacket on
Q. Was it Sandy Seale. Do you know him
A. Yes, I know Sandy and it looked like him
Q. Did he speak to you
A. No
Q. Did Jr. Marshall say anything else
A. He was drinking.
Q. How was he dressed
A. He had a light jacket on
Q. Were they standing or walking when you met them
A. Standing facing one another but when we came closer, they sort of parted and Sandy Seale moved back. We talked to Jr. got a match and left for home
Q. Did you see anybody else in the area
A. No. Not on Crescent St
Q. Did you notice anybody on the railroad tracks
A. No
Q. Where did you learn about the stabbing
A. My mother told me
Q. Did you see any weapons on either Jr. Marshall or Sandy Seale
A. No
Q. How were they facing
A. Sandy was facing the houses and Jr. Marshall was facing the Park
Q. What time would this be
A. I would say about 12 p.m.
We left the dance about 11:30 p.m

Signed: Patrician Harris [sic]
June 18th - 12:25 a.m.
Sergt. Det. J. F. MacIntyre Sergt. W. Urquhart.

Harriss has consistently stated she gave this statement as a result of police pressure, and that she gave it because she believed it was what the police wanted to hear before she would be allowed to go home.

According to both Eunice and Patricia Harriss, the police would not accept Patricia's story about the "two men". When Patricia would speak of the two men, Eunice Harriss testified that Urquhart would crumple up his writing paper and throw it away. She said he threw away about 12 sheets of paper, all of which were smaller than statement-size (8 1/2" x 14"). She described the interview on June 17 as follows:

Transcript, Page 2957

Q. You mentioned that there was pressure and tension?
A. Yes, a lot of pressure, of course.
Q. How would you describe that to us now? What do you mean by pressure?
A. 'There wasn't two men there, Patricia.' 'Come on now you didn't see two men.' 'Tell us now, who else did you see.' And they'd get back on the young people and something would be written down. In the end, I suppose, there was 12 scraps of paper on the floor, it was just tossed there and that was that.
Q. Now these comments that you just made to us, are these your recollection of comments that one or other of the police officers would make?
A. Yes.
Q. And which one or other would make them, do you recall?
A. Detective Urquhart.
Q. Did you at any time hear Detective MacIntyre make a similar comment?
A. No, not that I remember.

We do not accept that Urquhart started a number of "statements", crumpled them up and threw them away. Eunice Harriss herself testified that the papers thrown away were smaller than statement-size, and we believe that what Urquhart discarded, in fact, were notes he had taken while attempting to gather the information that would form the basis for a statement. There is nothing to suggest that this crumpling up and throwing away of notes was designed to intimidate Patricia Harriss, but it is also clear it had this effect.

Eunice Harriss also testified that, during the interview, her daughter, Patricia, became visibly upset and began to cry. She passed her a tissue. Patricia was upset for some period of time before MacIntyre suggested to Eunice Harriss that she leave the room, saying he believed Patricia was not cooperating and that "sometimes things work out best this way". (Transcript, Page 2960)

Eunice Harriss testified that she had no difficulty leaving, because she believed Patricia was "in good hands". She remained outside for the balance of the interview, seeing Patricia only briefly when her daughter was allowed out of the interview room.

For her part, Patricia Harriss testified that:

Transcript, Page 2800

A. At one point they offered - there would be times where it'd be very comfortable and I would calm down and then it would get very flared up again and bringing me something to drink pounding their fists on the table and saying I wasn't telling the truth.
Q. What do you mean pounding their fists on the table?
A. Well -

Q. Show me what it's like.
A. Oh, dear.
Q. Show me.
A. I haven't got big hands. Just (pop) -
Q. But you said (pound, pound), like that?
A. No, not that hard.
Q. Not that hard.
A. Hard enough to upset me.

Transcript, Page 2806

Q. … did you cry on more than one occasion that night?
A. More than likely, yes.
Q. Are you the type of person that cries a lot?
A. No.
Q. Was any mention made to you about what consequences you would suffer if you didn't tell the truth?
A. Yes.
Q. Tell us what was said to you about that.
A. I was told about perjury and that if I change anything or say anything different from what was in the statement, I would - I would go to jail.
Q. What statement are you talking about, Patricia?
A. Not any one statement in particular, just a statement, if I changed it. It was probably when after I signed it.
Q. When was the statement made, do you recall, about perjury?
A. Oh, all through the evening.
Q. Throughout the evening.
A. Yes.
Q. That if you - what, if you change your statement, you commit perjury and could go to jail?
A. I commit perjury and go to jail.

Both MacIntyre and Urquhart denied they exerted any pressure on Harriss. They specifically denied that they pounded their fists on the table or that they had taken and discarded any statements.

Although we believe that Eunice Harriss testified before the Royal Commission in a credible and straightforward manner, Patricia Harriss' evidence must be carefully assessed. There are a number of areas in which her credibility is in some doubt. During her various appearances in connection with this matter she has given contradictory testimony about a number of points, including whether she knew Sandy Seale before the stabbing and which police officers questioned her that night. She was also evasive about whether she herself had had a minor run-in with the law in Toronto and seemed to be excessively interested in criticizing the police.

It has been commonly accepted that Patricia Harriss was telling the truth in Harriss #1, and that the police pressured her into changing her story to fit their theory. However, on closer analysis, Harriss #1 does not mesh with the facts we have found.

The Harriss #1 statement says there were two men with Marshall and gives a description of one of them. Harriss says she did not see Seale in the park. At the Reference hearing in 1982, she testified there was one man on each side of Marshall and that she did not see Seale. If we accept this, and if the two men in question were Ebsary and MacNeil, it would place Marshall alone with Ebsary and MacNeil. According to the evidence of Marshall, Ebsary and MacNeil, they were not together as a threesome at any time. Terry

Gushue, in his statement, also places Marshall in the company of only one other man.

On the other hand, the facts related in Harriss #2 about Harriss and Gushue meeting Marshall and Seale, and Seale moving away, correspond generally with Marshall's testimony at trial, his statement taken at Dorchester Penitentiary in 1982, his affidavit of September 1982, his Reference testimony and his testimony at the Ebsary trials and before the Royal Commission.

If Harriss #2 is true, why would Harriss insist it is false? During her testimony before the Commission, Harriss was asked to explain the detailed description of the movements of Marshall and Seale she gave in Harriss #2:

Transcript, Page 2805

Q. Are you able to say how you - how you would have come up with that or why you would have come up with that?
A. I think just plain exhaustion.

Transcript, Page 2840

Q. This description of the two of them standing together, where did that come from?
A. I have no idea. I am not too responsible for this statement. I can't relate to it very well. I -
Q. I appreciate that and I'm not suggesting that you are responsible to it but I want to just know in these details whether that information, for example, that Sandy Seale moved back, could that have come from you?
A. No.

But if Harriss #2 is not true, as Harriss herself alleges, why does it correspond with what is now the accepted version of the facts? And if Harriss #1 is true, when did the situation Harriss described happen? Why was Harriss "adamant" that she saw two men with Marshall but, when asked to "describe the other men to me", she described only one of them?

To answer these questions, it is useful to consider Harriss' statements in light of the evidence of Mary and Catherine O'Reilley. After obtaining the statements of Harriss and Gushue, MacIntyre and Urquhart interviewed the O'Reilley sisters, two teenaged girls who were brought to the police station from their school the first thing the following morning. The timing of these interviews suggests some urgency in the police action.

Both Mary and Catherine O'Reilley gave statements. (Exhibit 16, Pages 74-79) Both indicated in their statements that Marshall had called Kate (Catherine) following the stabbing and told her his version of what happened in the park. Both statements refer to the facts as relayed by Marshall; both are similar in essential respects to Harriss #1.

There is evidence in Mary O'Reilley's statement to the police that she discussed Marshall's recitation of those events with Patricia Harriss.

Exhibit 16, Page 75

Q. Did you discuss this matter with Patricia Harriss
A. Yes
Q. Did you tell her about the grey haired man
A. I told her there was supposed to be a grey haired man there. I told her if she was questioned by the police, she should tell about the grey haired man that Jr. told me about

At the Commission hearings, however, O'Reilley denied that there had been any such contact and said the police must have inserted this part of the statement.

For her part, Patricia Harriss' testimony about possible contact between herself and Mary O'Reilley was contradictory.

Transcript, Page 2813

Q. Did you ever discuss with her the events of that night in the park?
A. No.
Q. I want to show you a statement that Ms. O'Reilley gave to the police....In that statement - and that statement was taken at 9:30 in the morning, the same morning that you left the police station around 12:30, about nine hours later ...Mary O'Reilley is reported to have said that she told you there was supposed to be a grey-haired man in the park with Junior Marshall and that if you were questioned by the police you should tell about that man, that Junior had told you that. Did that happen?
A. No.
Q. Are you certain that Mary O'Reilley never told you that?
A. I'm very certain. We - We never called one another. We never - We were in the same class together but that was about it, so if she did call me it would stand out in my mind.

However, on redirect examination by Commission counsel she said:

Transcript, Page 2945

Q. Is it in any way possible that you may have discussed it with any of the O'Reilley girls prior to this statement being taken?
A. If so, in not any great detail.
Q. Is it possible that you did discuss it with them prior to the taking of this statement?
A. Could have been, yes.

If Mary O'Reilley's testimony is accepted, it leads to the conclusion that MacIntyre deliberately fabricated both this portion of her statement and a handwritten note we shall refer to in a moment, presumably to provide an explanation for Harriss #1. We do not accept that this happened. Since Harriss #1 was incomplete and unsigned, there was no need to explain it away. Even though it mentioned two men, it still could not be used to support Marshall's version of the stabbing since it stated that Seale was not present. Besides, George and Alexander MacNeil had already given a statement on May 30 referring to "two men", so Harriss mentioning two men in her statement would not likely create problems for MacIntyre's version of events.

We believe Mary O'Reilley did speak to Harriss, perhaps just in conversation at school, and told her Marshall's story. The O'Reilleys were friends of Marshall and could be expected not only to believe him but also to tell their fellow students Marshall's version of the stabbing. They would see nothing unreasonable in suggesting to their friends that they repeat Marshall's story if they were questioned. (There is no evidence to indicate Marshall himself suggested they should spread the "two men" story; Marshall simply phoned Catherine O'Reilley and told her what happened, so no sinister motive can or should be attached to this.)

We believe Harriss simply used the information she'd been told by O'Reilley when Urquhart initially interviewed her. Harriss #1, in fact, resembles the information and descriptions contained in the O'Reilley statements, including the fact that the statements describe only the old, grey-haired man. Even though Harriss #1 refers to seeing two men, Harriss only describes one - using the same description given in the O'Reilley statements. If Harriss had, in fact, seen two men, one would think she would have offered two descriptions.

We believe that, as the questioning by Urquhart continued, Harriss realized she could not continue to adopt as her own - and then elaborate on - information provided by someone else.

At some point during the evening, MacIntyre somehow learned there had been contact between Harriss and the O'Reilleys. There is a note in the Sydney City Police Department documentation in MacIntyre's handwriting, which reads as follows:

Exhibit 16, Page 129

> Mary O'Reilley said to Miss Harriss that Sandy Seale ran up to the corner where Polletts is to tell his girlfriend that he was going with Junior. Mary is Margaret O'Reilley sister.
> The Reilley [sic] twins told me to tell the story about the grey haired man.
> Jr is a good friend of their's [sic] they hang around with the Indians. Mary told me that in school last Thursday she went with Pius Marshall now she goes with Steve?

Neither MacIntyre nor Urquhart nor the O'Reilley sisters could give any explanation at all for this handwritten note. When cross-examining MacIntyre, Urquhart's counsel suggested that MacIntyre received the information in a message the evening Harriss was first interviewed (Transcript, Page 6579), but this was not supported by any evidence.

We believe MacIntyre learned of the contact between Harriss and O'Reilley, wrote his note and then proceeded to question Harriss in the absence of her mother. Harriss #2 was the result. This latter statement, we believe, is true.

1.3.8 Conclusions regarding statements by juvenile witnesses

The Harriss statement was the last of three statements MacIntyre obtained from juvenile witnesses, all of whom were to provide the main evidence against Marshall.

The Commission believes MacIntyre obtained these statements - from Pratico, Chant and Harriss - through tactics that were reprehensible. We do not accept MacIntyre's testimony that no pressure was exerted on these juveniles to provide detailed information consistent with his theory of the stabbing. In particular, Pratico and Chant later gave perjured "eyewitness" testimony because MacIntyre had extracted these false statements from them and then threatened them with perjury if they changed their stories.

Although we have accepted that Patricia Harriss' second statement was true, the tactics used to obtain it were not acceptable. Harriss was interviewed at the police station for more than four hours on the evening of June 17-18. Both Harriss and her mother testified that she was crying and upset from the ordeal. In our view, keeping a 14-year-old girl at the police station until the early hours of the morning is objectionable. While Patricia's mother was with her for some of the interview and did not request to stay throughout, we believe it is obvious that a juvenile should not be interviewed by police officers without a parent present at all times. When the interview is at night, over a protracted period of time, and when the witness is visibly upset, it is even more important for a parent to be present.

1.3.9 Robert (Bobby) Patterson

One other small aspect of the police investigation requires comment. There is a reference in the Sydney City Police Department documentation in Urquhart's handwriting that says, "Patterson wanted". (Exhibit 16, Page 135) Urquhart testified that this note indicated that he had been asked to locate and interview Robert (Bobby) Patterson, whose name appeared in the statements of Marshall, Harriss #1 and Pratico. Those statements indicated he was in Wentworth Park on the night in question, so it is reasonable that the police would have wanted to interview him. Urquhart and MacIntyre denied interviewing Patterson. MacIntyre even denied knowing him.

Police records indicate Patterson had been in trouble with the police on a number of occasions. Under questioning by Commission counsel, Urquhart testified that he personally knew Patterson, that Patterson was well known to members of the police department and that "I would believe he would be well known to John MacIntyre."

Transcript, Page 9550

Q. … What steps did you take to find him?
A. Well, no doubt I went to his home and...
Q. Did you know where he lived?
A. I believe it was on George Street at that time, I'm not absolutely sure. I'd have to check the records to make sure of that?
Q. Sure. Did you know his family?
A. I knew his mother, yes.
Q. Uh-hum. What's her name?
A. Geraldine.
Q. Okay. And you say no doubt you went to his home.
A. I likely did and I likely enquired around from other people if Bob was around, or, you know, where he was.
Q. Would you use the assistance of other police officers to try and find him?
A. Yes, I likely would have said to any of the fellows in the car if you see Bobby Patterson, you know, pick him up and take him in I want to talk to him…

Q. Did you find him?
A. Not to my knowledge, no, I didn't ... I don't ... I'm sure that I didn't interview Bobby Patterson.

On the other hand, Patterson testified before the Commission that he was picked up at his Sydney home by two uniformed police officers, taken to the police station and interviewed by MacIntyre and Urquhart. (Transcript, Page 10021) He said MacIntyre handcuffed him to a chair, and banged his head on the table, insisting that Patterson had, in fact, seen Marshall stab Seale. Patterson stated that, at one point, Urquhart left the room for about ten minutes and returned with a typed statement for Patterson to sign. Patterson was not allowed to read the statement, but said the police told him it was about what he had seen in the park. We find much of the evidence in connection with this incident not believable.

We do not accept MacIntyre's statement that he did not know Patterson. All indications point to the fact that MacIntyre had a good knowledge of Sydney and those who were inclined to run afoul of the law. Indeed, MacIntyre himself had charged Patterson on February 1, 1971. (Exhibit 120)

To say the Sydney City Police Department could not find Patterson in Sydney is also not credible. Sydney is not a large city, and Patterson lived there with his mother. To make it even easier for them to find him, we note in passing that Patterson, as a result of another charge laid by the Sydney City Police Department, was in jail in Sydney at the Cape Breton County Correctional Centre in September 1971. The police could quite easily have found him there.

We conclude the police did, in fact, find Patterson at his home and did bring him to the police station, but we are not persuaded that Patterson's account of the interview is accurate. He has a lengthy criminal record and we believe he is capable of being critical of the police to the point of elaborately fabricating his descriptions of encounters with them. The references to being handcuffed and to having his head banged on the table are too extreme to be believable. While Patterson may not have been the most cooperative interviewee, there is no other evidence before us to suggest that the police were willing to resort to physical violence. We also do not accept that Urquhart produced a typed statement for him to sign. If the police wished Patterson to sign the statement, they would have first written it by hand, had it signed, and then later typed. The creation of an initial typed statement is not in accord with known practice.

We believe that Patterson was, in fact, located and interviewed by Urquhart and MacIntyre. No statement was taken.

1.3.10 Conclusions regarding John MacIntyre

John MacIntyre testified before us from December 7-11, 1987. He was vigorously questioned by many counsel and we had the opportunity to observe his behavior as a witness. Although there were many occasions when he indicated that he could not recollect events, we have concluded that he was frequently evasive and, on several occasions, simply untruthful.

MacIntyre's evasiveness was most apparent when he was questioned about his conduct of the original 1971 investigation. On the other hand, we did find his evidence persuasive and forthright in some situations, including his denial that he attempted to conceal evidence in 1982 as alleged by Staff Sergeant Harry Wheaton (see Part 1.8 of this Report).

In assessing the credibility of witnesses, as judges are often called upon to do, we can learn a great deal simply by having the opportunity to observe a witness as he or she is questioned. As the American Chief Justice Appleton put it in an 1860 text on evidence:

Cited in 5 Wigmore, *Evidence* (Chadbourne, 1974)

> The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control - fear, love, hate, envy, or revenge - are all open to observation, noted and weighed...."

There were many occasions when we noted MacIntyre's evasiveness and unwillingness to answer questions directly. Perhaps the clearest example of this occurred when Commission counsel attempted to get MacIntyre to tell the Commission who he now believes killed Sandy Seale. MacIntyre's responses are striking:

Transcript, Page 5903

Q. Chief, do you now believe that Marshall was not involved in the stabbing of Sandy Seale?
A. Well, I respect the court, and at this stage somebody else has been found guilty of it.
Q. That's not my question. Do you believe that Marshall was not involved in the stabbing?
A. At this time I would have to say that - in the stabbing of Seale?
Q. Yeh.
A. That the court ruled otherwise, and I take that ruling.
Q. Yeh, but do you believe it?
A. Well, I -
Q. Do you believe that Marshall was not involved -
A. I believed the court when they brought in that verdict.
Q. Okay. And do you now believe then that Maynard Chant lied to you on June the 4th of 1971?
A. That he witnessed Marshall stabbing Seale?
Q. Yes.
A. According to the verdict of the court, he did.
Q. No, according to your belief. Do you believe that?
A. Well, I do go along with the court, Mr. MacDonald.
Q. And do you believe that Pratico lied to you on June the 4th?
A. At this time, I would have to say that he did according to ...

Transcript, Page 5907

Q. Are you saying that once the decision of the Appeal Court was handed down on the rehearing, you then accepted and believed that you had been deceived by Pratico, Chant and Patricia Harriss?
A. Well, I'd have to accept the Court decision.

Counsel came back to the question the next day and again MacIntyre was evasive.

Transcript, Page 5997

Q. … Who do you believe stabbed Sandy Seale?
A. Well, up until '82, I had my belief on it that I was right, and the Appeal Court at that time gave a different decision. I've kept quiet ever since.
Q. Who do you believe today? What's your belief today? Who stabbed Sandy Seale?
A. Well, I guess I'd go along with - I'd have to go along with what the Appeal Court said.
Q. So you believe it was -
A. It's - the only problem I have with that is that the witnesses have changed their stories so many times.
Q. The Appeal Court acquitted Donald Marshall, but I don't believe the Appeal Court said who stabbed Sandy Seale. Is it your belief - Do you believe that Roy Ebsary stabbed Sandy Seale?
A. I think the question at this time is who - that I'd have to ask myself, who do you believe -
Q. Well, I'm asking you.
A. - as far as the witnesses are concerned. They've told so many stories, sir.
Q. Well, I'm asking -
A. And they're still telling stories as far as I'm concerned.
Q. I accept -
A. And it's adding to and what have you.
Q. Well, I accept that, Chief. I know what -
A. I'd leave that up to the Commission here to -
Q. But I'm asking you, sir, what is your belief? Who do you believe stabbed Sandy Seale? … Can I have an answer, Chief?
A. Again, I would leave it with the Courts; although I have my own problems with it.

There is more, all in the same vein. It would have been simple for MacIntyre to say he believed Roy Ebsary killed Sandy Seale, or that he did not. Instead, he was evasive. We find his reluctance to be straightforward reflects poorly on his credibility.

In 1982, MacIntyre swore an affidavit which was to be submitted to the Court of Appeal in connection with the Reference hearing. When MacIntyre was questioned about this affidavit, which was prepared for him by Frank Edwards, he denied giving Edwards any instructions concerning its contents.

Transcript, Page 6105

Q. Did you not give instructions to Frank Edwards in order that he could prepare the affidavit?
A. I did not.
Q. Did you not discuss it with him?
A. No, no.
Q. So he just prepared it himself and called you in?
A. That's right.

Counsel continued questioning MacIntyre on this point, and the next time the question was asked, he changed his response to "I don't recall meeting with him, no". (Transcript, Page 6107) Finally, Edwards' notes were produced. These notes not only referred to a meeting Edwards had with MacIntyre in connection with the affidavit but they also indicated MacIntyre had requested changes to the affidavit. MacIntyre relented:

Transcript, Page 6112

> A. Yes, I looked it over and I did swear to it, that's right.

If he had not been confronted with this direct evidence from Edwards notes, we have no reason to believe he would have told the truth about this matter.

There were numerous occasions when MacIntyre's testimony was in direct conflict with that of other witnesses. In this Report, we have already referred to the some of these contradictions: whether M. R. MacDonald spoke to MacIntyre on the morning following the stabbing; whether Robert Patterson was found and interviewed; whether Mrs. Chant was asked to leave the room when MacIntyre was taking her son's statement.

But there were also other incidents. Maynard Chant, John Pratico, Mrs. Chant, Patricia Harriss, Eunice Harriss and Emily Clemens all testified that MacIntyre told witnesses that if they did not tell the truth, they could go to reform school, be charged with perjury or go to jail. MacIntyre denied all this. Barbara Floyd, John Pratico and Maynard Chant all testified that MacIntyre had told them individually that he had witnesses who had seen them in the park on the night of the stabbing. MacIntyre denied this too. We do not believe all of these witnesses made up these stories. We do not believe MacIntyre.

We come away from MacIntyre's testimony convinced that MacIntyre, having concluded that Marshall stabbed Seale, became blindly determined to prove his theory and that his conduct of the investigation reflects that attitude.

In order to believe MacIntyre's assertions that he pursued the investigation of the Seale murder in a straightforward fashion without any preconceived notions of who had committed the crime or without exerting any pressure on witnesses, we would have to disbelieve the many witnesses who contradicted MacIntyre's recollection of events. As we have stated earlier, we are not prepared to do that. We believe it was MacIntyre who on occasion did not tell us the truth and that the investigation he carried out was far from straightforward.

1.3.11 Conclusions regarding William Urquhart

Throughout the investigation MacIntyre was assisted by William Urquhart. Although Urquhart played a secondary role, doing what he was told and exercising no independent initiative, he cannot escape responsibility simply by saying he was under MacIntyre's direction and control. Urquhart was a senior police officer himself and he had a responsibility to speak out when the investigation was being conducted improperly. Urquhart should have realized MacIntyre was pursuing only his own theory of the stabbing, notwithstanding information to the contrary. Urquhart should also have realized that Chant's second statement was improperly obtained. In failing to speak up about the deficiencies in the investigation, Urquhart failed in his responsibility as a professional police officer.

1.4 Trial Process

We find:

- that the Crown prosecutor and the defence counsel in Donald Marshall, Jr.'s 1971 trial failed to discharge their obligations, resulting in Marshall's wrongful conviction.
- that the Crown prosecutor, in view of the conflicting statements before him, should have interviewed all of the key witnesses separately prior to trial.
- that the Crown prosecutor should have disclosed the contents of prior inconsistent statements to the defence.
- that defence counsel failed to provide adequate professional representation in that they did not arrange for any independent investigation, interview Crown witnesses or seek disclosure of the Crown case.
- that defence counsel were aware of the existence of prior statements by Chant, Pratico and Harriss but did not request them.
- that the trial judge misinterpreted the *Canada Evidence Act* in refusing to permit a thorough examination of Pratico's comments outside the courtroom.
- that the cumulative effect of incorrect rulings by the trial judge denied Marshall a fair trial.

Following a meeting with the chief Crown prosecutor for the County of Cape Breton on June 4, 1971, John MacIntyre swore an information, charging Donald Marshall, Jr. with the "murder [of] Sandford (Sandy) William Seale contrary to Section 206(2) [now Section 223(2)] of the *Criminal Code* of Canada." Marshall was arrested that same day.

Marshall's preliminary inquiry was held on July 5, 1971 before Provincial Judge John F. McDonald. Crown prosecutor Donald C. MacNeil called a number of witnesses, including Patricia Harriss, Maynard Chant and John Pratico. Before he administered the oath, Judge McDonald questioned both Harriss and Chant in order to satisfy himself that these young persons understood the nature of an oath. Chant was questioned as follows:

Exhibit 1, Page 35

Q. Do you know what it is to take an Oath on the Bible?
A. Yes.
Q. What does it mean?
A. To tell the truth.
Q. What happens to people who don't tell the truth?
A. They commit perjury?
Q. And what happens to people who commit perjury?
A. They have to pay a fine.
Q. Besides paying a fine, what else can happen to them?
A. They can be sent to jail.

Chant then testified untruthfully that he had seen Marshall haul a knife out of his pocket and stab Seale. Marshall's lawyers did not cross-examine the witness. Pratico testified that he "seen Marshall haul something from his pocket and stab Seale." He also was not questioned by Marshall's lawyers. Patricia Harriss testified she saw

Marshall on Crescent Street the night of the murder and that there was only one person with him. Harriss was cross-examined by one of Marshall's lawyers.

When he testified before this Commission, Judge McDonald talked about Harriss, Chant and Pratico as witnesses:

Transcript, Page 5227

> **A.** ... I don't have any thoughts that they weren't telling the truth or anything like that. They impressed me as good witnesses.

He also said he did not get any indication at the preliminary inquiry that Pratico had any mental difficulty.

In order for an accused to be committed for trial following a preliminary inquiry, the judge must be satisfied on the basis of what he or she has heard that there is admissible evidence which could, if it were believed, result in a conviction. Not surprisingly, Marshall was committed for trial before judge and jury on a charge of murder.

Trials are conducted under an adversarial system in which the interest of the State is represented by a Crown prosecutor and the interest of the accused is represented by defence counsel. In order for a person to be convicted of murder, a jury of the accused's peers must decide unanimously that the evidence establishes the person's guilt beyond reasonable doubt. The role of the defence counsel is to satisfy the jury that the Crown has failed to prove its case beyond a reasonable doubt. Defence counsel has a responsibility to the court not to mislead, but otherwise is responsible only to the accused.

The interest of the State, on the other hand, is to see that justice is done. The objectives of Crown counsel were put succinctly by Justice Rand in his judgment in the 1954 Supreme Court of Canada case of *Boucher* v. *The Queen*, [1955] S.C.R. 16:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

If Crown counsel is aware of evidence that could be helpful to the accused, they must disclose its existence to the accused, or the accused's counsel, before the trial takes place. In certain circumstances, it may even be incumbent upon Crown counsel to make such disclosures directly to the court. (The role of the Crown prosecutor is examined in more detail in a later section of this Report.)

The trial judge in our criminal process also serves a very important function. During a trial, the trial judge must decide any issue of law that arises, and then must instruct the jury on the law to be applied in determining whether the accused has committed the crime with which he or she has been charged.

Based on the evidence presented to this Commission, we have concluded that both the Crown prosecutor and defence counsel failed to discharge their obligations adequately or properly, and that the trial judge failed to interpret correctly the *Canada Evidence Act*, with the result that the trial process failed Donald Marshall, Jr. and led to his wrongful conviction.

Marshall's trial took place in the Sydney court house from November 2-5, 1971, before Mr. Justice Louis Dubinsky and a jury. The Crown prosecutor was Donald C. MacNeil, Q.C.; defence counsel were C. M. (Moe) Rosenblum, Q.C. and Simon Khattar, Q.C.

Prior to his official arraignment on November 2, a grand jury (a body that no longer exists in Nova Scotia or anywhere else in Canada) was asked to consider the charges, if any, on which Marshall should be committed for trial. They considered what is known as a "Bill of Indictment" listing the charge and the names of the witnesses against Marshall. The grand jury had to satisfy itself on the evidence it heard that there was a proper case to be heard by a trial jury. The grand jury heard 11 witnesses, including Harriss, Gushue, Chant, Pratico and MacIntyre. During the taking of this evidence, no one was present except the members of the grand jury and the witness giving testimony.

At 3:20 p.m. on November 2, the grand jury returned a "True Bill" against Marshall. At 3:30 p.m. Marshall was arraigned and by 4:15 p.m. the jury had been selected and the prosecutor had commenced his opening address to the jury. During the next three days, the prosecution called 20 witnesses. Defence counsel called only Marshall.

Chant and Pratico testified, as they had at the preliminary inquiry that they saw Marshall stab Seale. In the face of this eyewitness testimony, Donald Marshall, Jr. took the stand on the afternoon of November 4 and denied he had stabbed Sandy Seale. His testimony, both direct and cross, took just over an hour and was conducted in English. It is clear from the trial transcript that Marshall was a poor witness, repeatedly being told to take his hand down from his mouth and to speak up. He could not have been impressive. (We will deal with the difficulties Native accused face in court appearances in a later section of this Report.)

Marshall finished testifying at 3:18 p.m. on November 4. In his address to the jury, which followed, Marshall's defence counsel concentrated on trying to discredit the testimony of Chant and Pratico. His address took 43 minutes. Crown prosecutor MacNeil followed and zeroed in on the fact that Chant and Pratico did not know each other, but had told the same story. In MacNeil's words:

Exhibit 2, Page 63

> The identification is positive! You have two eyewitnesses to this murder! Two completely unrelated men! Two men that there has not been the slightest suggestion that there was any communication between the two of them at any time to make up a story and yet they give identical stories, corroborated stories in two areas, Louisbourg and in Sydney! Now gentlemen, how many more witnesses do you want the Crown to

present to you? How many more witnesses? You've got two eyewitnesses! You've got their evidence corroborated!

Justice Dubinsky instructed the jury on the morning of November 5. After this was completed at 12:40 p.m., the jury withdrew to consider their verdict. At 4:35 p.m., they advised Justice Dubinsky that they had found Marshall guilty. Dubinsky rendered the mandatory sentence of life imprisonment. It was all over by 4:45 p.m.

1.4.1 Crown prosecutor

Donald MacNeil was the chief Crown prosecutor in charge of this case. He presented the Crown's case at the preliminary inquiry and during the trial. Although MacNeil has since died, we were able to accurately piece together relevant information concerning his role from the evidence of others and the documents available to us. MacNeil's estate was given standing and was represented by counsel at the Royal Commission's hearings. The evidence establishes that MacNeil was generally regarded as a skilled and competent prosecutor. Lewis Matheson, then an assistant Crown prosecutor, assisted MacNeil with the case but did not examine or cross-examine any witness.

During MacIntyre's discussion with MacNeil prior to laying the charge against Marshall, MacIntyre - as was his usual practice - turned over the entire police file of the Marshall investigation to MacNeil, including the "eyewitness" statements he had obtained from John Pratico and Maynard Chant.

MacNeil knew from having the entire file, however, that Pratico and Chant had given statements on May 30, 1971 that were inconsistent with their June 4 statements. He also knew about Patricia Harriss' incomplete statement, as well as the completed statement she signed during the early morning hours of June 18, 1971. And he would, in addition, have been in possession of the joint statement George and Alexander (Sandy) MacNeil gave on May 31, 1971. Neither of the MacNeil brothers was called as a witness at trial or at the preliminary, nor listed as a potential witness on any document that would have come to the attention of the defence counsel. Their statement, however, supported the description Marshall had given of James MacNeil and Ebsary.

Despite his knowledge of this conflicting evidence, MacNeil did not interview Chant, Pratico and Harriss separately prior to either the preliminary inquiry or the trial. Given the importance of these witnesses to the Crown's case, we believe he should have interviewed each of them separately in depth as part of what should be standard pre-trial preparation. That the witnesses were juveniles who had given conflicting statements made these interviews even more critical. MacNeil should have used these sessions to find out why they had made earlier, conflicting statements, and to satisfy himself that their later statements were truthful. We believe that if MacNeil had interviewed Chant, Pratico and Harriss separately, he might very well have learned that neither Chant nor Pratico had actually witnessed Marshall stabbing Sandy Seale.

MacNeil not only did not make the necessary effort to find out the reasons for those conflicting statements but he also - and just as importantly - did not disclose the existence of those earlier statements to Marshall's defence counsel.

According to the evidence before us, MacNeil generally did disclose the contents of statements of various witnesses to defence counsel if they asked for such information. If they did not, however, he would not make any disclosure. This appears to have been the generally accepted practice at the time in the County of Cape Breton and in other parts of Nova Scotia. Although this selective disclosure was contrary to the general views of senior lawyers in the Attorney General's Department as outlined in a letter of March 23, 1961 from then Senior Solicitor Malachi Jones to RCMP 'H' Division (Exhibit 81), other testimony indicated there was no systematic attempt by the Department to instruct its Crown prosecutors concerning the policy. (Transcript, Page 4920)

The evidence the Crown had in its possession in this particular case illustrates why the Crown must discharge this obligation to disclose. If defence counsel had been armed with the prior inconsistent statements by Chant, Pratico and Harriss, we believe they could have used them to raise at least a reasonable doubt about Marshall's guilt in the minds of the jury.

We believe MacNeil had an obligation prior to the preliminary inquiry to disclose to defence counsel the contents of the inconsistent statements given by Chant, Pratico and Harriss, and at least the names of George and Sandy MacNeil. His failure to discharge this obligation was a contributing factor leading to Donald Marshall, Jr.'s wrongful conviction.

1.4.2 Defence counsel

Donald Marshall's defence was in the hands of counsel who were considered to be among the most experienced and competent in Cape Breton County. All the evidence indicates that C. M. Rosenblum, now deceased, was a skilled criminal defence lawyer and that Simon Khattar had a long and distinguished career at the Bar. Rosenblum and Khattar were retained by the Union of Nova Scotia Indians and the Department of Indian Affairs, and were paid substantial fees. They also had access to any funds they needed to do whatever they decided was necessary in order to provide for Marshall's defence. Khattar testified at the Royal Commission hearings:

Transcript, Page 4693

Q. Was money any object to this defense? Did - were you going to be hampered in any way conducting a defence by concern about not having fee, for example?

A. Very shortly after I was retained, Mr. Rosenblum was retained. He was ... retained, I believe, by the Department of Indian Affairs. I'm not clear on that. In any event, he was retained by a different group from the ones who retained me. And we both indicated that we'll have a hard job to - to defend this man and we need a lot of help. We both had made the comment, "We're not restricted or hampered by way of money."

Q. Okay, so you -

A. And we were not. We're - there was [sic] no restrictions on us.

Q. Did you give any consideration to retaining some sort of an investigator to help you?

A. No sir.

Marshall was a young Native with no personal resources. He was in jail continuously from June 4 through the time of his preliminary inquiry and trial. He therefore had to depend exclusively on the efforts of Rosenblum and Khattar to meet the charges against him. They let him down. We consider their actions, or lack thereof, to be the antithesis of what one would expect from competent, skilled counsel.

Rosenblum and Khattar did not carry out or arrange for any independent investigation. They did not interview any of the witnesses for the Crown. Khattar testified:

Transcript, Page 4716

Q. Now, did you yourself or Mr. Rosenblum contact Chant or Pratico or Harriss?

A. Those were Crown witnesses and I'd indicated to you in our personal conversations before being called, it was not my practise to interview any Crown witnesses. I kept away from the Crown witnesses. I took my chances on the preliminary inquiry and relied on what information I got without seeing them. I've had cases where people - accused people - talked with Crown witnesses and were charged with interfering with them and I didn't, in all my practice, I've never talked with Crown witnesses prior to the trial.

Q. And do you know if Mr. Rosenblum followed the same practice?

A. My understanding was that was his practice as well. Not to talk to them.

Defence counsel also did not ask the Crown to disclose the existence of statements or the details of the case against their client. Khattar testified before the Royal Commission that defence counsel in Cape Breton did not make it a practice to seek disclosure of the Crown's evidence, and that neither he nor Rosenblum sought such disclosure in this case.

But the evidence of other witnesses contradicts Khattar. Lewis Matheson, for example, testified that Rosenblum's practice was usually to contact the Crown and seek disclosure of its case. Art Mollon, a Sydney lawyer since 1972, testified that he regularly sought and received such disclosure:

Transcript, Page 5421

A. … if I was defending someone … I called the Crown prosecutor and indicated to them that I was defending a person. … If they had the material there, they'd provide me with what they had. They would give me the background or statements. If I requested statements, I got them. It was complete cooperation is what - how I would describe it with the Crown.

Q. And in particular with the late Donald C. MacNeil, what was your experience with him?

A. Well, my experience was almost on a regular basis. I'd make it a point of being up the court house at around quarter to nine, nine o'clock. And I'd go into see Donnie and tell him who I was defending. He'd tell me what - what Crown evidence they had, what witnesses they were calling and, as a result of those, sometimes I'd go back to my client and, you know, perhaps it originally was to be a not guilty plea, we're going to go through a trial and that - - then after disclosure from the Crown, I'd relay it to my client and after consultations sometimes there would be a guilty plea or other times we'd go ahead with the trial.

Transcript, Page 5438

Q. … You were telling Mr. MacDonald about disclosure by the Crown, and you referred to the Crown providing statements and background with respect -
A. Yes.
Q. - to the case. Now, when you refer to statements, do you also mean that the Crown would provide to you statements of witnesses as well as statements that the accused person may have given?
A. Oh, if I ask for them, yes, if they had them. Sometimes they didn't have written statements from witnesses.
Q. So that if you went to the Crown and you asked for what aspects of the case that they had already compiled, if they had witness statements they would provide those to you as well?
A. Oh, yes. Yes.
Q. And would those witness statements include just the typewritten copies or would you get the actual copies of the handwritten statements?
A. Usually - No, usually, I'd get what the Crown had, which is usually typewritten statements. I don't recall - I've seen lots of handwritten statements because it's the handwritten statements that are usually introduced as an exhibit in court, and the typewritten one is just for a guide, but the handwritten statements, if I wanted to see them, they were always made available as well.
Q. Did you have to ask for those specifically, or would they also be provided along with their typewritten counterpart?
A. They - No, I'd go down. I'd - You know, if I was given a typewritten statement saying this is a, you know, copy of the accused statement or a witness statement, unless I had some reason to think that it was different from the written portion, I wouldn't ask for it, but I know that if I asked for - I'm just saying that whatever I ask for from the Crown, in my experience, I always got it whether it was a written statement, a typed statement, photograph, crime reports, lab reports, I had no problems with the Crown.

During the course of Marshall's trial and before the case went to the jury, a group of teenagers read a newspaper account of the evidence John Pratico had given and realized he could not be telling the truth. Although Pratico testified that he ran home after witnessing the stabbing, they had seen him in the parking lot of St. Joseph's Church after news of the stabbing had circulated. These teenagers decided to tell Marshall's lawyers what they knew. Barbara Floyd called Rosenblum's offices and asked to speak to "Donny Marshall's lawyers". Floyd testified to what happened then:

Transcript, Page 3140

A. A man came back on the phone and didn't - I don't remember him identifying himself. He just said, "May I help you?" And I told him that I had just read the paper, and I was calling about John Pratico, that he couldn't possibly be a witness because he was at the dance, and he said, "You're too late." And I said, "I beg your pardon," and he just repeated himself and then he hung up.
Q. Had you identified yourself? Did you say who you were?
A. I'm pretty sure I did.
Q. Yes. Did you say anything else other that the fact that John couldn't have seen it because he was at the dance?
A. That's all I remember saying to him. Then he just kind of cut me off.
Q. Yes. And were there other things that you had prepared in your mind that you wanted to say to him?
A. Well, I thought he would've said to come down and talk to him, you know. We would have said what I'm saying now, but -

Q. But you didn't get a chance?
A. No.
Q. Do you have any idea how long that conversation lasted?
A. Seconds.
Q. Seconds?
A. Yes.
Q. Do you recollect what the man's attitude was on the other end of the phone? Can you describe what his voice was like?
A. He was just blunt.
Q. Blunt?
A. "You're too late," he said. And I remember thinking, "It's not too late because he's not convicted yet." It hadn't come over the radio that he was guilty.

According to the information available to us, Rosenblum was a sole practitioner and there were no other lawyers working in his office. Indeed, Khattar himself testified there were no other males working in Rosenblum's office at that time. Therefore, we believe Rosenblum was the person who dismissed this new evidence out of hand.

Pratico had told a number of people outside the courtroom that he had lied in his statement to police (a matter we will deal with in more detail later), and Barbara Floyd had told Rosenblum that Pratico could not have seen the stabbing. Still, Rosenblum did nothing. We cannot understand why Rosenblum did not follow up on this important information and present the evidence to the jury.

In 1982, Rosenblum and Khattar both gave affidavits in connection with the Reference hearing, in which they said they were unaware of the existence of written statements given by Chant, Pratico and Harriss to the Sydney City Police in 1971. (Exhibit 134, Pages 129-132)

Given the evidence presented to this Commission, we find this difficult to understand. The evidence, in fact, suggests Marshall's counsel were aware of these statements.

Consider this excerpt from the transcript of the preliminary inquiry when Harriss was cross-examined by Rosenblum:

Exhibit 1, Page 26

Q. How many times have you spoken to [MacIntyre] about this evidence you are giving today?
A. Twice.
Q. When was the last time?
A. Last Tuesday.
Q. And I suppose you signed the statement?
A. Yes.
Q. … The second interview with Sgt. MacIntyre you gave a written statement?
A. Yes.
Q. Were you asked to give a written statement before that?
A. I don't think so.

A Statement of Facts prepared by the Crown and filed in the court file would have been available to defence counsel. It specifically notes that Chant "first related to the police the story the accused gave him but later advised that he related the false story because of fear of the accused." (Exhibit 1, Page 80) During Rosenblum's cross-examination of Chant at trial, he asked him specifically about "that untrue story" Chant told the police (Exhibit 1, Page 152), indicating that Rosenblum was aware Chant had given two separate stories to the police.

As further indication that defence counsel knew of the existence of such statements and how to get access to them, Khattar testified before us that he was aware that MacIntyre would take statements from witnesses he interviewed and that those statements would be delivered to the Crown. When questioned about his 1982 affidavit, Khattar said:

Transcript, Page 4779

Q. It's paragraph 7 that I want to direct your attention to:
"That I was not provided with copies of any of the Statements referred to in the ... Affidavits, purportedly taken by the Sydney ... Police prior to the...trial in November of '71, nor was I, at the time of the said trial aware of the Statements." Now -
A. That is correct.
Q. As I read that paragraph, I understand it to be saying that the statements that were taken by the Sydney police prior to November of 1971 - That's prior to the conviction.
A. Yes.
Q. You didn't have copies of them, and you were not aware of them.
A. That is correct.
Q. That's what I read that -
A. Both statements are correct.
Q. Okay. Now, last day I referred you to references in the transcript where Patricia Harriss said that she had given signed statements to the police.
A. And - yes.
Q. So you were certainly would've been aware of that?
A. I recall - Yes.
Q. And I referred you to the references where the examination of Mr. Chant was being carried on, and he said he had given an untrue statement and then a subsequent statement.
A. That's right.
Q. And I understood you to agree with me that you would certainly expect that those would be written statements given John MacIntyre's practice?
A. Yes.
Q. So I would've thought you were aware, at the time of the trial, that there would be such statements so I - that's why I'm having difficulty -
A. Yes, you may - yes.
Q. Now, would you explain, sir, that -
A. My reference to being aware is having actual knowledge of the statements other than - the way you put is well, "Yes, you knew statements were taken. They were taken in writing." But I was not - I had no knowledge of the particular statements -
Q. You didn't know the details of them.
A. But I'm aware of them.
Q. Is that what you're saying? You wouldn't have known what they said in detail?
A. That's correct. Yeh.

We conclude that Rosenblum and Khattar were aware Chant, Pratico and Harriss had given statements to the police, although they likely did not know the details contained in such statements. For their own reasons, defence counsel elected not to attempt to obtain those statements. Eleven years later, in affidavits filed with the Court of Appeal in connection with the Reference hearing, they stated that "if evidence of the contents of the Statements ... had been adduced at trial, then the jury might reasonably have been induced to change its views regarding the guilt of Donald Marshall, Jr." (Exhibit 134, Page 130) These statements, in their own words, faithfully describe the consequence of their failure to obtain copies of these crucial statements.

Why did they not obtain them? It is one of many questions we have concerning the role played by Marshall's defence counsel. Why, for example, did they not have an independent investigation conducted? Why did they not contact the Crown to learn the case to be met? Why did they not find out that Pratico, a key witness for the Crown, spent the time between the preliminary inquiry and the trial in the Nova Scotia Hospital being treated for mental illness?

Bernard Francis, a court worker in Sydney in 1971, testified that in his opinion Rosenblum did not work as hard for Native clients. We also heard evidence to suggest that Rosenblum and Khattar believed Marshall was guilty. Did those feelings influence the effort they put into mounting Marshall's defence?

We conclude that the fact that Marshall was a Native did indeed influence Rosenblum and Khattar. Given the reputation for competence they enjoyed in the Cape Breton legal community and the totally inadequate defence they provided to Marshall, the irresistible conclusion is that Marshall's race did influence the defence provided to him.

For whatever reason, Donald Marshall, Jr. did not get the professional services to which any accused is entitled. Had defence counsel taken even the most rudimentary steps an accused should be entitled to expect from his or her counsel, it is difficult to believe Marshall would have been convicted.

1.4.3 Trial judge

During the course of Donald Marshall, Jr.'s trial, the trial judge, Mr. Justice Louis Dubinsky, made various incorrect rulings on evidence. While many of those errors may not have influenced the outcome of the trial when considered individually, some were indeed serious and may have had an effect on the verdict. In any case, the cumulative effect of the errors is such that we must conclude that Marshall did not receive a fair trial.

Professor Bruce Archibald, who teaches criminal law and criminal procedure at Dalhousie University Law School, provided us with a comprehensive opinion (Exhibit 83) that reviewed various incorrect rulings on evidence by the trial judge. (This opinion is included as Appendix 13 to this Report.)

In summary, his criticism of the rulings of the trial judge included Mr. Justice Dubinsky's rulings on the use of hearsay evidence, or what the judge and counsel incorrectly considered to be hearsay; his ruling in allowing an improper reference to a tattoo on Marshall's arm that read "I Hate Cops" (an irrelevant aside in the evidence that was extremely prejudicial to Marshall); his ruling allowing the parents of Sandy Seale to be called as witnesses (ostensibly to establish continuity of exhibits, but which was also likely to obtain sympathy from the jurors); and his rulings improperly limiting the cross-examination of important witnesses. We accept Archibald's opinion on all of these issues.

There is one particular error by the judge that Archibald considers in detail and on which we wish to comment as well. This concerns Mr. Justice Dubinsky's handling of John Pratico's attempt to recant his statement that Donald Marshall, Jr. had killed Seale and that he had witnessed the stabbing.

In the corridor while he was waiting to testify, Pratico, of his own volition, approached Donald Marshall, Sr. He told him that Donald Marshall, Jr. did not kill Sandy Seale and that Pratico had lied when he testified at the preliminary inquiry that he had witnessed the stabbing.

Marshall, Sr. immediately advised Khattar of this development. Khattar did not wish to speak to Pratico by himself and arranged for the High Sheriff for the County of Cape Breton to be present. The Sheriff, in turn, had Donald MacNeil summoned. According to Lewis Matheson, MacNeil, Khattar, Rosenblum, John MacIntyre, the Sheriff and Matheson were all present in the Barristers' Lounge when Pratico told them he had not witnessed Marshall stabbing Seale. Everyone assembled advised Pratico to tell the truth when he took the witness stand and not to be concerned about perjury.

When Pratico was sworn, MacNeil immediately attempted to introduce the evidence of what had been said outside the courtroom. The judge refused to permit it to be heard at that time. (Exhibit 1, Page 156) Subsequently, Khattar did bring out what Pratico said outside the courtroom during his cross-examination of Pratico, but MacNeil objected and the trial judge refused to permit a thorough and searching cross-examination about why Pratico had said what he did, why he had lied at the preliminary and other matters. (Exhibit 1, Page 182)

As is pointed out by Professor Archibald, the judge's ruling was based on a fundamental misinterpretation of the applicable sections of the *Canada Evidence Act*.

The law allows great scope in cross-examining a witness in order to identify inconsistencies in his or her evidence. By exposing such inconsistencies, defence counsel can seriously weaken the credibility of a prosecution witness. If a witness made a previous statement inconsistent with his or her current testimony, the witness may be cross-examined extensively on why the statement was made and the surrounding circumstances. If that witness denies having made the inconsistent statement, then other witnesses may be brought in to testify that the statement was in fact made. This is governed by Section 11 of the *Canada Evidence Act*. But Section 11 does not apply if the witness admits making the statement and it has no relevance in limiting the cross-examination of the witness on why the inconsistent statement was made. Pratico admitted having made the inconsistent statement so Justice Dubinsky committed a serious and obvious error by using Section 11 to limit cross-examination of Pratico. As a result, the defence and prosecution were precluded from fully exploring the reasons for Pratico's conflicting statement.

We do not criticize the actions of Khattar, MacNeil and the others who met with Pratico in the Barristers' Lounge. We do suggest, however, that someone - MacNeil or Khattar, most logically - should have advised the trial judge of this startling development and asked that he immediately conduct a *voir dire* to determine what had taken place and why. Knowing he was dealing with a juvenile witness who was attempting to recant the evidence he gave at the preliminary inquiry the judge may well have proceeded in an entirely different manner with the result that Pratico would have told the truth to the jury.

We believe a full and complete cross-examination of John Pratico at this stage by Khattar almost certainly would have resulted in his recanting the evidence given during his examination-in-chief that he had seen Marshall stab Seale. In those circumstances, no jury would have convicted Donald Marshall, Jr.

But that, unfortunately, is not what happened. Marshall was convicted and sentenced to life in prison. During the course of the trial, Justice Dubinsky made a comment that, in retrospect, now seems ironic in the extreme:

Exhibit 1, Page 138(O)

> Whether I am right - who is there in this world who can say that he never made mistakes, is a matter which may, may, if necessary, be looked into at some future time.

1.5 1971 RCMP Review

We find:

- that the Crown prosecutor in Sydney, Donald MacNeil, and the Attorney General's office in Halifax failed to discharge their duties because they did not disclose the existence of important new evidence to counsel for Marshall in November 1971.
- that Robert Anderson, the Director (Criminal) in the Department of Attorney General should have instructed his Crown prosecutors to bring the evidence to the attention of Marshall's counsel.
- that the RCMP review failed to uncover Donald Marshall, Jr.'s wrongful conviction because of Inspector E. A. Marshall's incompetent investigation into Jimmy MacNeil's allegations.

Ten days after Donald Marshall, Jr. was convicted, Jimmy MacNeil went to the Sydney City Police Department. MacNeil, who had been convinced to come forward by one of his brothers, told police he had been present at the time of Seale's stabbing and that Roy Ebsary - not Donald Marshall, Jr. - committed the murder. Accompanied by his brothers, John and David, Jimmy MacNeil gave a statement to the Sydney City Police Department in the early evening of November 15, 1971. Jimmy MacNeil's statement was startling:

Exhibit 16, Page 176

> Nov. 15th, 1971 - 7:25 p.m.
> Statement of James William McNeil [sic], age 25 yrs., residing at 1007 Rear George St., Sydney:
> Myself and Roy Ebsary were at the State Tavern, George St., Sydney, late in the evening in May of this year. We were there about an hr. or so. We left. We walked down George St. and took the short cut through the Park (Wentworth). We came up to Crescent St. and while walking along Crescent St. we were approached by an Indian & a colored fellow from behind. The Indian put my right hand up behind my back. The

colored fellow said dig man dig. Then Roy Ebsary said I got something for you. He put his hand in his right pocket and took out a knife and drove it into the colored fellow's side.

Q. What side

A. The left hand side of the colored fellow. I seen Roy's hand & knife full ob [sic] blood

Q. Did you see the Indian being stabbed

A. No. I did not

Q. What happened then

A. Roy went home and I went with him. He washed the knife under the tap and washed his hands off. Then he told me not to say anything about it

Q. Did you ask him why he done it

A. Yes, he said it was self defence

Q. What time did you get home that night

A. About 12 P.M.

Q. How long were you at Roy's house that night

A. About 1 hour after that

Q. When did you see Roy again

A. The next day I went to his house. He was laying in bed. I told him that fellow died

Q. What did he say

A. He said it was self defence. I told him he did not have to kill him. He told me he had 2 children - a girl and boy and not to say anything to the police. I left then

Q. Who seen you at the house besides Roy

A. His wife, daughter & son.

Q. Did they say anything to you then

A. No. Not that day. About 2 days after than [sic] his son, about 18 or 19 yrs old came to my house with his car. He drove me out to the Wandlyn Motel- He went in the motel and his mother came out to the car. She got in the back seat. He got in and she said don't go to their house any more because of what Roy done. The young fellow told me if I mentioned what happened to the police all your family will be in trouble. They will have to go to Court

Q. Was his mother present when he said that

A. No

Q. What were you wearing that night

A. I was wearing a college coat - blue with 2 white marks on the sleeve

Q. What was Roy wearing

A. A black shawl over his shoulders - something like a priest wears over his shoulders

Q. When did you tell somebody about this

A. The first one I told was my mother. She noticed I was not sleeping and walking around since the trial. She asked me and I told her about the stabbing and Indian man was in jail for something he did not do. It isn't fair. Then I told my brother Johnnie last night. He told me to go to the police

Q. Did you know Marshall or Seale that night

A. No

After MacIntyre advised assistant Crown prosecutor Matheson (chief Crown prosecutor Donald MacNeil was on vacation at the time) about Jimmy MacNeil's statement, Matheson spoke to MacNeil himself. He then asked the police to arrange to take statements from the Ebsary family. They took statements that same day - November 15, 1971 - from Roy Ebsary, his wife Mary, and their son, Greg. (Exhibit 16, Pages 181-194) They did not take a statement from the Ebsarys' daughter, Donna, even though Matheson had asked the police to take statements from the Ebsary family. During the taking of statements, in fact, Donna Ebsary sat outside the police station in the family car.

After the statements were taken, Matheson contacted Robert Anderson, the Director (Criminal), Department of Attorney General in Halifax, to tell him what had occurred and to suggest that polygraph tests be conducted.

Anderson contacted RCMP Superintendent Donald J. Wardrop, the Criminal Investigation Branch Officer (CIBO) for 'H' Division. Wardrop instructed Detective Inspector E. A. (Alan) Marshall to go to Sydney and determine whether there was any substance to MacNeil's allegations.

Although Marshall did not see his task as involving a complete reinvestigation, he did testify that he thought his mandate was to get to the bottom of the situation and to determine whether there was any substance to MacNeil's story. (Transcript, Page 5607)

Inspector Marshall arrived in Sydney on November 17, 1971. On December 21, 1971, he filed a report which stated that he had conducted "a thorough review of the case". (Exhibit 16, Page 204) His report concluded that Donald Marshall, Jr. had stabbed Sandy Seale. When Inspector Marshall appeared before this Commission, he testified that he now believed he had "botched the investigation". (Transcript, Page 5709)

What did Marshall do? How did he botch the investigation? Marshall, it is clear now, had the opportunity to uncover information that would have led inevitably to the conclusion Donald Marshall, Jr. had been wrongfully convicted. We believe Marshall did not take up this opportunity because he relied completely on what MacIntyre told him about the case and because he depended far too heavily on his own faith in the judicial system, which had already determined that Marshall was guilty.

On November 17, Marshall discussed the case with MacIntyre and visited the scene with him. Although MacIntyre testified he gave Marshall the entire file on the case, Marshall himself indicated he only received certain file material from MacIntyre. This material included the June 4 statements of Pratico and Chant and the June 17 statement of Gushue, as well as copies of the November 15, 1971 statements of Jimmy MacNeil and Roy Ebsary.

In reviewing Marshall's report, there is no indication he had the Sydney City Police Department's entire file on the case. For instance, when referring to Chant's and Pratico's trial evidence, Marshall's report refers to the fact that neither of these two witnesses told the police the truth when they were first interviewed. But there is no reference in his report to the May 30 statements by Pratico or Chant. There is no reference at all to Patricia Harriss although there were two statements from her in the Sydney City Police Department file. We conclude that Marshall was not given the entire Sydney City Police Department file on the case. Marshall testified that he made no request for the entire file because:

Transcript, Page 5615

> **A.** ...at that point in time I was seeking his cooperation. I was treading very gently and he had this dossier of papers prepared for me.

Marshall also interviewed MacNeil on November 17 and concluded, in the words of his report, that MacNeil's account "was a figment of his imagination". MacIntyre had already told Marshall that MacNeil's statement was a "cock-and-bull" story. On that same day, MacIntyre showed Inspector Marshall Donald Marshall, Jr.'s jacket. Inspector Marshall remembers MacIntyre discussing his theory that Marshall's arm wound had been self-inflicted.

By the time Inspector Marshall left Sydney on November 17, he had already begun to believe Donald Marshall, Jr. had committed the crime even though he had not spoken to Roy Ebsary, Donald Marshall, Jr., or to Chant, Pratico or Gushue. Incredibly, Marshall never interviewed any of the people involved except Jimmy MacNeil. And he spoke to him only briefly in conjunction with the taking of the polygraph test.

Marshall returned to Sydney on November 23, 1971 to conduct polygraph examinations of MacNeil and Ebsary. These tests were administered by RCMP Corporal E. C. Smith, one of the force's polygraph operators. Smith concluded that, based on his tests, Ebsary was telling the truth when he said he had not stabbed Seale, but that he could not give an opinion on whether Jimmy MacNeil was telling the truth about seeing Ebsary stab Seale.

Crown prosecutor Donald MacNeil came to the hotel where the tests had been administered and, after being advised of the results, notified the Attorney General's Department in Halifax. As a result, the Attorney General's Department knew on November 23, 1971 of the results of the polygraph tests on Ebsary and Jimmy MacNeil.

We believe Crown prosecutor MacNeil had an obligation to disclose to Donald Marshall, Jr.'s lawyers that Jimmy MacNeil had come forward, the resulting statements and the fact that the polygraph tests of Ebsary and MacNeil had been taken. He did not do so and, in our view, was in breach of his obligation to disclose.

Similarly, Robert Anderson, having been made aware of the new information - he testified he was aware of the polygraph tests - was under an obligation to make sure his prosecutor provided this information to Marshall's defence counsel. If defence counsel had been aware of this new evidence, it would almost certainly have resulted in a new trial and that in turn would in all likelihood have resulted in Marshall's acquittal.

We indicated earlier in this Report that Inspector Marshall placed complete reliance on what MacIntyre had told him concerning the case. This became abundantly clear during Marshall's testimony before the Royal Commission. He agreed on numerous occasions that findings in his report were based solely on what MacIntyre had told him. This included his finding that Marshall removed his bandage and flushed it down the toilet at the jail so police could not get his blood type from the bandage, and that Ebsary and MacNeil were intoxicated on the night of the murder. Again, this information came solely from MacIntyre. Despite this, Marshall's report was written in such a way that it would leave the impression that

Marshall had carried out a complete review of the case, including interviewing witnesses.

In addition to trusting what MacIntyre told him, Marshall was content to rely on the results of Roy Ebsary's polygraph test to conclude that Ebsary was telling the truth. He did that in spite of the fact that both he and his polygraph operator testified that polygraphs should only be an aid in an investigation and should not be the only investigative technique employed. They both agreed complete reliance on the polygraph would not be good police practice. (Transcript, Pages 5641 and 6844)

In summary, we find that Inspector Marshall conducted no independent investigation of his own. He even failed to request the entire file from MacIntyre. His lack of effort is shocking. If he had done a real investigation, he would have discovered that Donald Marshall, Jr. did not stab Sandy Seale. There can be no doubt that Marshall's incompetent investigation was a major contributing factor in Donald Marshall's spending 11 years in jail.

We were unable to determine if Marshall's report reached the Department of Attorney General. Superintendent Wardrop testified he would likely have taken the report with him to the regular meeting he had with the Attorney General's staff each Thursday. He was not able to say for sure he did so in this case, only that he likely would have done so. Although there was no covering transmittal slip with the report, Wardrop indicated that there probably would not have been one if he had hand-delivered the report. Although it was clearly RCMP practice to pass on reports to go to the Attorney General's Department, whether by hand or by mail, none of the witnesses from the Attorney General's Department had any recollection of having seen Marshall's report in the Department.

Regardless of whether the report was officially turned over to the Department, we do know that Robert Anderson knew Ebsary and MacNeil had given statements, and he also knew that polygraph tests had been administered. Despite this knowledge - and despite the Department's own belief that such information should have been disclosed to defence counsel - it was not.

Anderson was aware that Marshall's counsel had filed a Notice of Appeal. When he assigned Department lawyer Milton Veniot to act for the Crown in the appeal, Anderson should have disclosed the fact of the reinvestigation to Veniot. If this had been done, then Veniot too would have had an obligation to disclose this information to defence counsel.

We believe any competent defence counsel would have used such information to call for an immediate investigation of this new evidence and that such an investigation would almost certainly have resulted in the discovery of Marshall's wrongful conviction.

1.6 Appeal Process

We find:

- that counsel for Donald Marshall, Jr. failed to put arguments before the Court of Appeal concerning fundamental errors of law during the trial, and that this failure represented a serious breach of the standard of professional conduct expected and required of defence counsel.
- that the Crown's case should not have been handled by a junior lawyer in the Department.
- that Crown counsel should have raised the issue of the trial judge's erroneous rulings when defence counsel failed to do so.
- that there should have been greater cooperation between local Crown prosecutors in Sydney and the lawyers handling the appeal in the Department of Attorney General in Halifax.
- that the Court of Appeal had a duty to review the complete trial record and ensure that all relevant issues were argued.
- that the errors by the trial judge were so fundamental that a new trial should have been the inevitable result of any appeal.

Following Marshall's conviction for second degree murder on November 5, 1971, Rosenblum (Khattar was no longer acting for Marshall) filed Notice of Appeal on November 16. (Exhibit 2, Page 113) Although it is clear from the transcript of the trial that Justice Dubinsky's improper rulings, especially regarding the limitation of cross-examination of Pratico, contributed significantly to Marshall's conviction, this was not brought forward during the appeal process. The trial transcript indicates that none of the key players - prosecutor, defence counsel or trial judge - fully appreciated the evidentiary issues involved.

We believe the failure to recognize and advance this particular argument on appeal represented a serious error, not only by defence counsel but also by the Crown and the Court of Appeal as well.

Bruce Archibald testified that Justice Dubinsky's improper rulings in connection with Pratico's cross-examination were so fundamental:

Transcript, Page 5521

> A. ...that the Court of Appeal, before whom this matter had been raised, would inevitably have had to grant a new trial on the basis that there had been an erroneous ruling and it could not be said that there was no possibility that this did not lead to a substantial wrong or a miscarriage of justice.... I think there's no question that it was - significantly contributed to the conviction.

We agree with Archibald.

1.6.1 Defence counsel

The grounds of appeal Rosenblum put forward in his Notice of Appeal consisted of the following:

Exhibit 2, Page 114

1. *That* the Learned Trial Judge erred by not adequately instructing the Jury on the defence evidence;
2. *That* the Learned Trial Judge erred by his charge to the Jury in that he gave his own opinion on certain aspects of the evidence which opinion was highly prejudicial to the accused;
3. *That* the Learned Trial Judge misdirected the Jury on the meaning of "reasonable doubt";
4. *That* the evidence did not establish beyond reasonable doubt the guilt of the accused;
5. *That* the Learned Trial Judge erred in asking the Jury to draw certain inferences from evidence which was not presented;
6. *That* the Learned Trial Judge misdirected the Jury that it was their duty and his duty to look at the evidence and from that source alone to arrive at the conclusions which are required by justice and by law;
7. *That* the Learned Trial Judge misdirected the Jury in that the charge of the Learned

Trial Judge was capable of being understood by the Jury as being prejudicial to the accused;

8. *That* the conviction is against the evidence, the weight of the evidence and the proper application of the evidence and is perverse;

9. *That* the address to the Jury by the Prosecuting Officer was highly inflammible [sic] and included remarks in which he expressed his personal opinion that I was guilty of the charge on which I was being tried;

10. *That* the Learned Trial Judge erred in admitting inadmissible evidence;

11. *That* the Learned Trial Judge improperly permitted the Prosecuting Officer to cross-examine the witness, Maynard Chant, before ruling that such witness was adverse;

12. *And* such other grounds as may appear when I or my Counsel obtain a transcript of the evidence at the trial and the Judge's address to the Jury.

The factum (brief of the argument) Rosenblum filed dealt primarily with Justice Dubinsky's charge to the jury and to the weight to be afforded to the evidence of Pratico and Chant. He put forward no argument on grounds 5, 6, 9 or 10, and he did not submit any argument concerning the key erroneous rulings Justice Dubinsky made that limited counsel's opportunity to find out why Pratico made his contradictory statement in the court house corridor.

If Rosenblum had argued these issues, the Court of Appeal would inevitably have ordered a new trial. His failure to do so represented, once again, a serious breach of the standard of professional conduct expected and required of defence counsel.

1.6.2 Crown counsel

The practice in Nova Scotia is - and was in 1971 - that a criminal appeal to the Court of Appeal is handled by the Halifax office of the Department of Attorney General rather than by the local Crown prosecutor who had carriage of the case at trial. In this case, we have evidence that there was no communication between the Sydney prosecutors and Halifax counsel handling the Marshall appeal in 1971. The Halifax office regarded the appeal as routine and assigned Milton Veniot, then a junior counsel in his first year at the bar, to handle it.

We do not believe any appeal from a murder conviction can or should be classified as routine. The seriousness of the charge and the length of sentence involved place a heavy burden on all counsel involved at any stage to be particularly vigilant.

Veniot testified that he prepared the Crown's brief of argument and in so doing responded to the matters raised by Rosenblum in the Notice of Appeal. He also stated that, as Crown counsel, he had an obligation to draw to the attention of the Court of Appeal any errors made by the trial judge that contributed significantly to the conviction of the accused, even where no objection was raised by defence counsel. Veniot testified that in this case he was aware of Justice Dubinsky's error in limiting the cross-examination of John Pratico:

Transcript, Page 7040

Q. And did it occur to you at the time that what was occurring was wrong and, secondly, that as a result of that wrong ruling Mr. Khattar was not being allowed to ask why Mr. Pratico had said what he had said outside the courtroom, and that that might have been important?

A. ...I think it's obviously wrong but it's one that we used to have to deal with all the time. And if [Khattar] didn't think it was such a big deal, then I guess I just didn't pay too much attention to it.

It is not clear from Veniot's testimony whether he considered this limitation to have been an incorrect interpretation of the hearsay rule or an incorrect application of Section 11 of *Canada Evidence Act*. What is clear however is that Veniot clearly recognized the error but did not pursue it primarily because defence counsel had not raised it. He testified:

Transcript, Page 7040

A. ...If they didn't think it was important enough to turn the trial, then I just didn't direct my mind to it because it was and is my experience that there are many evidentiary rulings made by trial judges with which a lawyer can object and if [he] feels strongly enough about his objection, then he can do something about it. And they chose not to and I guess I just didn't put my mind to it.

Transcript, Page 7055

A. ...I think I'm guided, and entitled to be guided, as to what is and what isn't a serious issue, particularly in a ruling on an evidentiary point in the circumstances of this case, by the attitude taken by defence counsel, who were certainly far more senior to me. They just didn't make anything of it, to speak of. Maybe they should have.

We believe it is regrettable that Crown counsel, who should operate independently, was influenced concerning the significance of these matters by defence counsel who did not fully appreciate the evidentiary issues involved. We have some sympathy for Veniot's position. He was a junior Crown counsel appearing on a matter in which the accused was represented by very senior and well-respected counsel. One may conclude that it would have been presumptuous on Veniot's part to advance an argument on behalf of the accused where counsel for the accused failed to do so. Veniot impressed us as a competent Crown counsel who recognized the errors made at trial. His superiors should not have regarded a murder appeal as routine and should not have assigned junior counsel. However, once assigned, and having recognized the error involved, Veniot should at the very least have sought instructions from his superiors on drawing this issue to the attention of the Court of Appeal. The obligation of Veniot and his superiors was to ensure that any error of law contributing to the conviction, and not raised by the defence, was before the court.

We believe Crown counsel have an obligation to raise important issues not raised by the defence, even if those issues are contrary to the Crown's position. While court proceedings are based on the adversarial process, and while the adversarial process is generally considered the best way to assess facts, the adversarial process is not an end in itself. It must serve the administration of justice and not vice versa. As noted by Zuber, J. A. in *R.* v. *Savion and Mizrahi*

(1980), 52 C.C.C.(2d) 276 (Ont. C.A.) at p. 289:

> By reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill and vigor. Indeed the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice...

Watkins, L. J., expressed similar sentiments in the context of the obligation of Crown counsel to draw to a judge's attention errors in the giving of direction to a jury. In *Raymond Donoghue* (1988), 86 Cr. App. R. 207 at p. 271), he stated:

> ...this is yet another instance of the failure of prosecuting counsel to draw a judge's attention to a fundamental omission in the giving of directions. Although the primary responsibility for such an important matter must rest upon the judge, we consider it is unfortunate that neither counsel appears to have noticed that the judge gave no general direction on the burden of proof. It would be helpful, we think, if counsel for the prosecution made a check-list of the directions on the law which he considers the judge ought to give and draws attention of the judge to any failure on his part to give an essential direction before the jury retires.

In the case of an appeal, the obligation of Crown counsel is to raise before the court of appeal all relevant issues of law even if such issues are not advanced by defence counsel.

Veniot and his superiors in the Department of Attorney General failed to ensure that all the relevant issues were raised, and we believe that failure contributed to the denial of Marshall's appeal and to his continued incarceration.

In our opinion, the lack of communication or briefing between Veniot and the Sydney prosecutors represented a serious oversight. While such interaction may not have resulted in additional issues being argued, it may have brought to light the information that Jimmy MacNeil had brought forward following the conviction. Veniot testified he was not aware of MacNeil's statements, but he believed that the Crown had an obligation to disclose it. If this new evidence had been brought to the attention of defence counsel and to the Court of Appeal, we believe it is all but inevitable that a new trial would have been ordered.

1.6.3 The Appeal Court

What is the proper role of the Court of Appeal in a case such as this in which both defence and Crown counsel fail in their obligation to raise and argue all properly appealable issues? Should the Court have identified and dealt with these issues on its own? Professor Archibald:

Transcript, Page 5524

> A. Certainly it would be within the discretion of the Court of Appeal to do that, and I would view it as an appropriate exercise of discretion. I would say it's the right thing to do. I - But insofar as the matter was not argued, no factual matters were, as I understand it, brought to the attention of the Court of Appeal to suggest that the testimony from the eyewitnesses was - had been obtained in improper ways,

> then I hesitate to say that there is a duty on the part of the Court of Appeal to do that. It certainly is within their discretion and I would think it a proper exercise of discretion but when the parties have not raised it, I'm reluctant to call it a duty.

Transcript, Page 5525

> A. ...I think that there may have been, what I would call, a moral duty for the Court of Appeal to [do] that. I think that the Court of Appeal should have done that. I think it was wrong for the Court of Appeal not to have done that, but I'm not willing to say that there is a legal duty that they have to even though the matter has not been thought to be significant by - I guess I - The adversarial system is in there as important in my view.

For our part, we believe a court of appeal has a duty to review the record of a criminal case placed before it. If the court becomes aware during this review of a significant error, which has not been raised by counsel, we believe the court has an obligation to raise the issue with counsel and to ensure that it is properly argued. If necessary, counsel should be recalled to deal with the issue. In this case, the Court of Appeal did not comment on the serious issues which were readily apparent on a reading of the trial transcript. These errors were so serious that a new trial should have been the inevitable result of any appeal.

We recognize that a duty such as we have outlined imposes a heavy burden on an appellate court, but it is important to remember that a provincial Court of Appeal is for all practical purposes the court of last resort for a convicted appellant. Since the possibility of a "routine" criminal matter being heard by the Supreme Court of Canada is virtually non-existent, provincial Courts of Appeal represent the final opportunity to make sure the law is properly applied according to accepted principles.

Our criminal justice system functions as an adversarial process, which is supposed to ensure that only the guilty are convicted. The overriding principle is the search for justice. There can be no justice if a conviction is sustained because of the inadequacy of counsel. The Appeal Courts must ensure that justice is done. When counsel fails, the courts must step in.

1.7 The 1974 and 1975 Reviews

We find:

- that Constable Gary Green acted properly in providing information regarding Donna Ebsary's evidence to the Sydney City Police Department, and that he cannot be faulted for failing to investigate the matter further.
- that Urquhart was remiss in his duties when he failed to follow up on new evidence indicating that Donna Ebsary had seen her father with a blood-stained knife on the night of Seale's murder.
- that the RCMP did conduct a file review of the Marshall case in 1975 and that while little is known about its purpose or results, it is clear that the Sydney City Police Department cooperated with the RCMP in the 1975 review.

During Marshall's years in prison, his case was looked at again by various authorities on at least three separate occasions.

1.7.1 Donna Ebsary's evidence

In 1974, a Sydney martial arts instructor named David Ratchford raised with a friend, Constable Gary Green of the Sydney RCMP, the possibility of Roy Ebsary's involvement in the killing. Ratchford had heard the story from Donna Ebsary, a student at his martial arts school whom he had befriended. She told him that on the night of May 28, 1971 she had seen her father, Roy Ebsary, washing what she thought was blood off a knife. She told him she believed her father had murdered Seale.

After Ratchford and Donna Ebsary told this to Green, he advised them to go to the Sydney City Police. Ratchford accompanied Donna to the police station where they spoke to Urquhart. Urquhart advised them that Roy Ebsary had been questioned and that the case was closed.

After Ratchford told Green their visit to police headquarters had not produced any results, Green visited the police department himself and talked to Urquhart as well. Green says he specifically told Urquhart Donna had seen her father washing blood off a knife on the night in question. (Transcript, Pages 7089, 7090, 7099) Green testified that Urquhart produced the Marshall file, which Green said he could have examined but chose not to look at. Urquhart told him Donna Ebsary was a "disturbed and disgruntled young lady", (Transcript, Page 7089A) and that he was not going to reconsider the matter based on another rumor. Urquhart also told Green the matter had already been reviewed by the RCMP.

When Green inquired later within the Sydney RCMP General Investigation Section (GIS), he was told Roy Ebsary had passed a polygraph test. Green testified that his "confidence in Donna Ebsary's story almost evaporated" (Transcript, Page 7094) and, as a result, he did not pursue the matter further.

Although Urquhart in his testimony denied that Green's visit to the Sydney City Police Department ever took place, we have concluded that Ratchford, Donna Ebsary and Green did, in fact, visit the Sydney City Police Department in 1974, and that Donna Ebsary's information was brought to Urquhart's attention.

We cannot criticize Green's actions in this matter, which he was raising almost three years after Marshall's conviction, and after a 1971 RCMP review had apparently confirmed that Ebsary was not the killer. By offering to let him look at the file, the Sydney City Police Department said, in effect, that it was not prepared to reopen the case based on Donna Ebsary's story, but that the RCMP was free to look at it if it wished. But Green had no mandate to reinvestigate the matter. We believe he acted properly in making sure that this new information was brought to the attention of the police department and that he cannot be faulted either for failing to look at the file offered him by the police department or for failing to pursue the matter further.

We are, however, critical of Urquhart's failure to take any action. He had been given new and potentially significant evidence that Donna Ebsary had seen her father washing blood off a knife. Urquhart knew, or should have known, that she had not been interviewed in November 1971.

Even if Urquhart knew about the results of the November 1971 Ebsary polygraph and Marshall review, he still should have paid more attention to this new information. At the very least, Urquhart should have made sure he told MacIntyre about the information. Although the evidence is that MacIntyre was in the vicinity when Ratchford spoke to Urquhart, there is no evidence to indicate that MacIntyre was told about it.

Regardless of his own opinion about the veracity of Donna Ebsary's story, Urquhart had a duty to see that this new information was passed on to his superior. This he failed to do. This information should have been passed on by the police to the Crown, and by the Crown to defence counsel. The obligation of the Crown to disclose information to the defence is a continuing obligation; although three years had passed since Marshall's conviction, defence counsel remained entitled to assess information clearly pertinent to his client's claim of innocence.

1.7.2 The 1975 review

The Marshall case surfaced again in an unexplained file review in 1975. Sergeant Eugene Cole of the RCMP testified he was stationed with the Sydney GIS from 1975 to 1980 and his notes for September 29, 1975 read in part:

Exhibit 96

> 29 Sept 75
> Deputy Chief Sydney C.P. interviewed and advised that Roy Ebsary was given a lie Dector [sic] test and found to be cleared and not involved.
> Enquiries conducted into Seal [sic] Murder case 5 yrs. old.
> Marshall presently serving life for this murder.
> 1 Oct 75.
> 9 AM - 12 NN interview and enquire into. Seale Murder 1971. vintage ie: enquiry. re: Ebsary.
> 3 Oct 75.
> 9 AM-10 AM read Ebsary File re Seale Murder.

Cole testified he had no personal recollection of the matter, but assumed he had been directed by a superior to review the file. He testified that the files he reviewed must have been at the Sydney City Police Department. MacIntyre testified that someone from the RCMP did visit the police department and asked to review the Marshall file. The department gave them permission to do so.

Based on the evidence before us, we believe it is fair to conclude that the RCMP conducted some sort of a file review in 1975. The fact that Cole's notes referred to reading the "Ebsary" file rather than "Marshall" file indicates that this review must also have been in connection with Ebsary's possible involvement.

Although we have very little evidence concerning this review, we have no reason to doubt Cole's notes, and we conclude, on the basis of those notes - and MacIntyre's testimony - that the Sydney City Police Department once again was not reluctant to allow the RCMP to review the matter.

1.8 The 1982 Reinvestigation

We find:

- that Staff Sergeant Wheaton and Corporal Carroll should have been more circumspect in questioning Marshall in Dorchester about what happened on the night of the murder.
- that Chief MacIntyre did not deliberately attempt to hide any documents from the RCMP investigators.
- that the Department of Attorney General did not interfere with the RCMP investigation.

More than six years after the mysterious 1975 file review, the Marshall case once again became the focus of official attention when Stephen Aronson, the lawyer now acting on behalf of Donald Marshall, Jr., wrote a letter to John MacIntyre. By that time, MacIntyre had become the Chief of the Sydney City Police Department. In his letter dated January 26, 1982, Aronson said he had learned that a man by the name of Mitchell Bayne (Sarson) had heard Roy Ebsary admit to killing Seale and he asked that, on the basis of this new evidence, the case be reopened.

Aronson had been retained on Marshall's behalf in 1981, and visited him in Dorchester Penitentiary on September 3. Also present at this meeting with Marshall were Roy Gould, Danny Paul, and Sarson. Sarson related to Aronson his story about Ebsary. Aronson considered the possibility of collusion between Marshall and Sarson given that a close relationship existed between Marshall and Sarson's sister. However, he decided that he should review the trial and appeal record in order to detemine "exactly what the basis of the conviction was". (Transcript, Page 10091) In addition to reviewing the trial material, Aronson contacted the parole authorities to ascertain the likelihood of Marshall's being released on parole. Following a further meeting with Marshall and after learning that Ebsary had recently been involved in a knife-related incident, Aronson wrote to Chief MacIntyre requesting that the investigation be reopened. Aronson is to be commended for his diligence in pursuing his client's case even though he felt that the burden of reversing a 10-year-old conviction would be a heavy one.

On February 3, following receipt of Aronson's letter, MacIntyre convened a meeting with Frank Edwards, the Crown prosecutor, and Inspector Don Scott, the officer in charge of the Sydney Subdivision of the RCMP. MacIntyre suggested the RCMP should investigate the matter since his force had conducted the initial investigation.

1.8.1 The Wheaton investigation

Scott assigned Staff Sergeant Harry Wheaton, plain clothes coordinator of the General Investigation Section (GIS) of the Sydney Subdivision, to investigate the allegations in Aronson's letter.

Wheaton, assisted by Corporal James Carroll, reviewed a number of statements MacIntyre had provided, the trial transcript and the 1971 RCMP review. He then obtained information on Ebsary from his wife, Mary, and from police records, and interviewed Jimmy MacNeil and Mitchell Sarson.

Wheaton and Carroll were initially skeptical of Sarson's story, believing, like Aronson, there may have been some collusion between Marshall and Sarson. However, on February 16, 1982 after he and Carroll interviewed Maynard Chant at his home in Louisbourg, Wheaton and Carroll began to believe Marshall might indeed be innocent. Chant gave a statement in which he admitted having lied in 1971. He said he was not even in the park when Seale was stabbed. The investigators then interviewed Pratico, Roy Ebsary, Patricia Harriss, Gushue and Marshall.

On February 22, Ebsary telephoned Wheaton and admitted stabbing Seale. Carroll immediately went to Ebsary's home to get a statement but Ebsary refused to provide it. Much later, in October, Carroll delivered a tape recorder to Ebsary who recorded his version of the events of May 28 and 29, 1971. (Exhibit 19, Page 138) In that version, Ebsary said "possibly I got him in the guts" and that the next person who struck him "would die in his tracks".

In addition to interviews with a number of other individuals, the investigators gathered some physical evidence which also supported Marshall's innocence. Greg Ebsary turned over to Wheaton ten knives that had been stored in a wooden basket in the Ebsary home. Adolphus Evers of the RCMP, who had originally analyzed Marshall's and Seale's clothing for serrations and blood stains in 1971, used samples he had kept from Marshall's yellow windbreaker and Seale's brown coat to examine the ten knives and the basket fibres. He found that some fibres corresponded and one particular knife had 12 fibres consistent with those in the two jackets.

On March 25, 1982 Superintendent Douglas Christen, the officer in charge of the Criminal Investigation Branch (CIB) of the RCMP, sent a report on Wheaton's investigation to that point to the Department of Attorney General.

Exhibit 19, Page 66

> The examination of the knife given to our members by Mrs. Ebsary would appear to indicate that Roy Newman Ebsary was responsible for the murder of Sandford Seale. Results of the C.D.L. examination will be forwarded to you upon receipt. If the examination is conclusive, this evidence, in conjunction with the eyewitnesses account of events by James William McNeil [sic] and Donald Marshall, Jr., would be sufficient to proceed with a charge against Ebsary.

The information Wheaton and Carroll obtained during their investigation formed the basis of the evidence that led to Marshall's acquittal.

We do not intend to provide a detailed chronology of the RCMP reinvestigation. The details can be found in Exhibits 19, 21 and 99. Marshall's innocence was established as the result of painstaking and professional police work. The thorough investigation carried out by Wheaton and Carroll in a highly unusual case stands in stark contrast to the police work of 1971.

Although this RCMP reinvestigation did finally lead to Marshall's release and acquittal, there are aspects of it on which we wish to comment. We will examine the circumstances surrounding the taking of Marshall's Dorchester statement, for example, because we believe it sheds light on why Donald Marshall, Jr. might have told the investigators he was involved in a robbery attempt on the night Seale was stabbed. We will consider allegations that Chief MacIntyre attempted to conceal evidence from the RCMP investigators. Finally, because of a number of comments he made in the course of his testimony, we will also consider the question of Staff Sergeant Wheaton's overall credibility as a witness.

1.8.2 Marshall's Dorchester statement

Wheaton and Carroll interviewed Marshall at Dorchester Penitentiary on February 18 and March 9, 1982. On their second visit, they took a signed statement from Marshall in which he referred to a plan to get some money by "rolling" someone, calling back "the two guys" and "they then knew we meant business about robbing them". The handwritten statement reads:

Exhibit 114

> In 1971 I was convicted of the murder of Sandy Seale in Sydney, N.S. At this time I was seventeen years old and living with my parents on Membertou Reservation. I guess you could say I was a bad young guy. I drank a lot and generally hung around. I was picked up by the Sydney City Police on several occasions. I was questioned a lot by John MacIntyre for things like knocking over gravestones, dynamite caps and was kicked out of Wentworth park. MacIntyre didn't like me as I wouldn't talk or confess to these crimes.
>
> On the night of the murder I was not with Sandy Seale until around midnight. I was with Roy Gould, Pauline Bernard and some other woman. We came from Hfx and arrived in Sydney around 9:30 P.M. Artie Paul, Roy Gould and I then went to the Liquor Store. Artie and I then went to Terry Tobins on Inter Colonial St. From there we went to the Keltic Tavern. I left the Tavern alone at roughly a quarter to ten or ten to ten. I walked from Dorchester St. to George St. in the area of Wentworth Park.
> When I arrived in Wentworth park that night I enter the Park on the little path that runs off George Street. I remember seeing Sandy coming down the Path that runs from the little store on George Street that would be Mac's Dairy. Sandy and I met in the center of the park on this Path. I remember Sandy telling me he came from the dance and he said he was heading home. I think this is when Bobbie Patterson came down from behind the bandshell. Patterson was very drunk so put him under some bushes so the police wouldn't get him. I recall asking Patterson if he knew us as he was also stoned on acid. He said he did.
>
> I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone. I had done this before myself a few times. I don't know if Sandy had ever rolled anyone before. We agreed to roll someone so we started to look for someone to roll. The first time I saw the two fellows we later decided to rob was on the George St. side of the Park. The short old guy I now know as Ebsary was dressed like he came off a boat. He had a blue coat over his shoulders. My memory is poor on just how we got over to the Crescent St. side of the Park but I do remember seeing Patricia Harris and Terry Gushue and giving Terry a light. Sandy went over and talked to Ebsary and the other guy. The three of them would be maybe 20 yards from Patricia, Terry and I.
>
> I then walked down Crescent Street to Sandy and the two guys. We talked about everything women booze about them being priests and hinted around about money. The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy. Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying I got something for you and then stabbing Sandy.
> I let go of the guy I had and Ebsary came at me. He swung the knife at me and I held the knife off with my left hand. The knife sort of caught in my jacket and I pulled free and ran and felt blood running from the cut. I can't describe the knife and Sandy fell and stayed there. I ran across the bridge and ran into Chant. I told him what happened. I met people coming from the dance and we went over to where Sandy was. I remember

> going up to a house and asking a guy to call an ambulance. A girl gave me a kerchief to put on the cut on my arm.
>
> I definitely did not stab Sandy Seale. I saw Ebsary do it. When questioned about this I did not mention that Sandy and I were robbing these two as I thought I would get into more trouble. I never told my lawyers or the Court I just thought I would get in more trouble. I felt bad about Sandy dying as it was my idea to rob these guys. I knew Sandy but not real well and its too bad he died but I didn't kill him Ebsary did. I am willing to take a polygraph test to prove I am innocent. I did not stab Sandy. I gave the Police a statement when it happened and a week later I was picked up by MacIntyre he didn't question me very much he said he had two witnesses to say I did it and locked me up.

This statement was later used against Marshall by the Crown during the Court of Appeal Reference hearing. Its effect was devastating.

But was it the truth? At the time he gave the statement, Marshall knew Ebsary had told a story about a robbery. He knew this because of a bizarre series of coincidences. Marshall's girlfriend at the time was Shelly Sarson. Marshall had met her when she was visiting her brother John, a prisoner at Dorchester. Her other brother, Mitchell, was a very close friend of Roy Ebsary and indeed lived with him for a time. One evening, Roy told Mitchell that he had stabbed a "colored fellow" in Wentworth Park during the course of an attempted robbery. (Exhibit 99, Page 45) Mitchell told this story to his sister Shelly, who told it to Marshall.

To complicate the question of determining whether the statement is true, we heard evidence that the RCMP officers told Marshall that if he was to have any hope of getting out of jail, he had better tell the officers a story they could believe; otherwise, they would walk away and he would never see them again. (Transcript, Page 11765) Marshall himself testified he believed he had to follow Ebsary's story about the robbery in order to be believed.

Prior to taking what was to be an incomplete statement from Marshall on February 18, Carroll testified that Wheaton told Marshall something to the effect that he believed "there was something else going on in the park other than just a casual walk through the park to catch a bus" on the night Seale was killed. (Transcript, Page 8769) After he made that comment, Carroll testified, Marshall told the officer the story about the robbery. (Transcript, Page 8774)

There is conflicting evidence on whether the officers gave Marshall a warning that what he said could be used as evidence prior to either Dorchester statement. Such warnings are normally given when statements are taken; failure to issue such warnings may result in the subsequent statement being ruled inadmissible in court.

Wheaton testified that Marshall was warned prior to the first statement. Carroll testified that no warning was given. Carroll testified that if there had been a warning, he would have followed his usual practice and written in the warning as he was taking down the statement. No reference to a warning appears on the statement, so we accept Carroll's evidence that no warning was given.

Carroll also testified that he did not remember any warning being given at the taking of the second statement either. Wheaton, who took the statement, testified that a warning was given. Wheaton testified it was also his practice to note the warning in the statement, and the handwritten notation - "warned" - appears on the handwritten statement. (Exhibit 114) A further written reference to a warning appears in Wheaton's notes. (Exhibit 99, Page 2) We accept that a warning was given prior to the second statement.

The RCMP officers' approach was unfortunate. Instead of indicating to Marshall they were aware of some additional facts and implying something other than a "casual walk through the park" may have been involved, they should simply have asked Marshall to tell them the facts. If he made no reference to the robbery, then it would have been appropriate for them to ask questions concerning it.

Given that Marshall had been unable to establish his innocence during the preceding 11 years, we believe Wheaton and Carroll should have been especially circumspect in interviewing him. Their encouragement to him to tell them a story they could believe, notwithstanding the fact that the statement was accompanied by a warning, suggests to us that in the circumstances the signed second statement Marshall gave at Dorchester cannot be described as voluntary.

If a *voir dire* - a special hearing to determine the admissibility of evidence - had been held on Marshall's statement during the Reference hearing, we do not believe the statement would have been admitted.

1.8.3 Wheaton/Davies - statement incident

The second issue on which we wish to comment concerns the question of whether Chief MacIntyre attempted to interfere with Wheaton's investigation by deliberately trying to conceal a key piece of evidence.

During his investigation, Wheaton did receive a number of statements taken by the Sydney City Police Department in 1971. MacIntyre gave most of these statements to Scott on February 3. Scott then passed them to Wheaton. Wheaton testified that MacIntyre later gave him the Gushue and Harriss #2 statements on February 26. He also testified that MacIntyre, in response to an order of the Attorney General dated April 20, 1982, turned over to him the November 1971 Mary and Greg Ebsary statements on April 26, 1982.

Why was the file turned over in such a piecemeal fashion? Why did the RCMP not simply request - or demand - the entire file at the beginning of their investigation? Wheaton testified that both he and Scott were reluctant to demand the file because it may have jeopardized the relationship between the Sydney City Police Department and the RCMP.

Transcript, Page 7600

Q. At that time had you wished, could you have compelled production of any statements in the Chief's possession?
A. We could have obtained, I feel, probably a search warrant. I had enough evidence possibly to get a search warrant.
Q. But there were avenues open to you to compel production.
A. Yes, sir. There were avenues open to us. The relations between the Mounted Police and Sydney City Police would have went to zilch but we could have done it.
Q. ... As best as you can recall, Staff Wheaton, can you indicate to us how the file was demanded and take this meeting of the 26th of February. Can you, as best as you can, tell us what the words were...
A. Just politely asked. "John, do you have anything else, now, that you could give us? Any other written things? Any other things that you can tell us?"

Following the February 26 meeting with MacIntyre, Wheaton testified that he met with Scott and Crown prosecutor Edwards to discuss their difficulty in getting material from the Sydney City Police. Edwards testified that he suggested they obtain a search warrant. "I can recall that conversation fairly specifically," Edwards testified. "I said, 'Look, why don't you go get the search warrant and just put it in your hip pocket? Go down and see the Chief, demand the file, ask for it, and if he doesn't give it, demand it. And if you still don't get it, then reach in your pocket and slap the search warrant on his desk." (Transcript, Page 11788)

Scott opposed such a confrontational approach and he eventually requested instead that Edwards obtain an order from the Attorney General directing the Sydney City Police Department to turn over all of its files. Edwards was asked about this.

Transcript, Page 11786

Q. Was that just a way to get the heat off their back, is to put it somewhere else?
A. That is my view.

When MacIntyre received the order from the Attorney General dated April 20, 1982, he prepared a list of the material in his possession (Exhibit 88) and contacted the RCMP.

Wheaton and Sergeant Herb Davies, then a Corporal, met with MacIntyre at the Chief's office on April 26, 1982. Davies' testimony concerning the meeting with MacIntyre indicated that he accompanied Wheaton to act as an "observer" to what transpired.

Transcript, Page 8649

A. Chief MacIntyre had the files there. It was quite obvious to me upon our arrival that he was expecting us. The meeting was pre-arranged, by whom, I don't know. But in any event, when I went there we took our seats as shown in Exhibit 109 and Chief MacIntyre began to go through the files and passed the various documents across to Staff Sergeant Wheaton. There was only one time when I observed the Chief had a document in his hand that this document did not go to Staff Sergeant Wheaton.
Q. Where did it go?
A. The Chief took that document in his left hand and placed it down on the floor. Now, I will say I could not see the document when it hit the floor, but I could see Chief MacIntyre take it in his hand and drop it.
Q. Would you describe it as an accident or deliberate dropping?
A. In my opinion it was deliberate.
Q. He took it in his left hand. Did he drop it immediately down or did he throw it under? Describe in a little more detail.

A. Okay. This particular document came from a manila file folder that the Chief sort of had partially on the desk and partially on his lap. And he took the document from that and he might have leaned just a little bit and dropped it on the floor. I couldn't see when it hit the floor but I could see when it left his hand.
Q. Did you, did the Chief observe the document before he did this?
A. Yes, he did, sir. He read it before he threw it on the floor.
Q. What was the general practice being followed that day by the Chief as he was handing over documents? Would he read them first?
A. He would look at all documents first, sir, yes.
Q. Would he describe what was in them?
A. He would read off the names, etc., and say what it is. Statement of such-and-such, statement of such-and-such. And...
Q. And what would Wheaton do then? As it was handed to him.
A. Wheaton would take possession of them and, if I recall correctly, he would - I'm not certain exactly at what point he filled all of these - he initialed for all of the documents. But I do know that after receiving what Staff Wheaton felt was all of the documents I know that Exhibit 88 was signed by Staff Wheaton, in my presence, in front of the Chief.
Q. And are you telling this Commission that you observed Chief MacIntyre take a document, read it and deliberately put it on the floor?
A. That's exactly what I'm telling this Commission, sir.
Q. Thank you. How long were you in the Chief's office?
A. Oh, it could have been an hour or so. It could have been a little better.
Q. And at what point in the visit did that event occur?
A. I feel it was close to the end but, I tell you, I didn't interrupt at that particular moment when he dropped it because my reason for that was the meeting between Chief MacIntyre and Harry Wheaton and myself was running so smooth. I said to myself, "I will let it continue this way and bring it to Staff Wheaton's attention as we are leaving." I didn't want to have any conflict between Chief MacIntyre and Harry Wheaton and myself if it was not necessary.

Transcript, Page 8651

A. After Staff Wheaton received what he thought was everything that pertained to the Marshall file, he asked the Chief, I would say on at least two occasions, "Now, Chief, do we have it all? Do we have it all?"
Q. What was the answer?
A. "Yes." So Staff Wheaton thanked the Chief and I think I did also. I feel quite - I'm sure I did. Thanked him. We just got outside of the Chief's door when I stopped Staff Wheaton. I said, "Staff, you didn't get the complete file. The Chief dropped a document on the floor."
Q. Now...
A. What that document was at that particular time, I didn't know.
Q. Did the Chief accompany you to the door?
A. The Chief was still in his office and we were just outside of the door. It didn't take me very long to advise Staff Wheaton of what took place. Then Staff Wheaton went right back into the Chief's office, ahead of me. I went in behind him. He advised the Chief as to what I told him concerning him dropping a document on the floor. The Chief went over behind his desk, picked up the document and made a remark to the effect, "I might just as well give you it all."
Q. ... How would you describe the Chief's demeanor at that point?
A. Well, needless to say, in my opinion at this particular time, the Chief was quite upset.
Q. How did that manifest itself?
A. ... He became quite flushed and maybe a little bit nervous at that point.
Q. What happened then?
A. Staff Wheaton took the document from the Chief...
Q. Yes.
A. And we left. There was no further conversation, sir.
Q. Were you satisfied at that time that you had everything?
A. Yes, sir.
Q. Did you look under the desk?
A. No, I didn't. But I only saw him drop one document. I didn't know how many pages there were to it or anything at that particular time. One document.

Q. What happened after you left the office?
A. When we left the office after Staff Wheaton received that document, he didn't put it in any of the files nor in his briefcase, he kept it in his hand. I drove back to our headquarters on Alexandra Street and Staff Wheaton did read the statement to me while en route from the Chief's office to our office, but I will say the statement didn't mean anything to me. I wasn't involved in the investigation so I didn't know what it was all about.
Q. Was there any indication from Staff Wheaton that the document meant anything to him?
A. There was indication from Staff Wheaton, and I know certainly it had to mean something to Staff Wheaton. He was the chief investigator. I was not investigating this particular file, I was assisting on this particular day.
Q. Did you take it that it was a significant document?
A. Yes, I did, sir.
Q. From Staff Wheaton's comment or actions or whatever?
A. Yes, I did.
Q. But you have no recollection today what the document, indeed, was.
A. Yes. He read it to me.
Q. Can you tell us what it said?
A. I can't tell you what it said but if I recall correctly it was a statement from Patricia Harriss.
Q. And do you actually remember that?
A. Yes.

In his testimony before the Commission, Wheaton told essentially the same story and provided more specific identification of the document in question.

Transcript, Page 7750

A. ... as we drove up the hill returning to the office, I read it and found that it was a partially completed statement of Patricia Harriss on the 17th of June 1971 written by William Urquhart, I believe it was.
Q. Do you have any doubt at all, sir, that that partially completed statement was given to you by Chief MacIntyre after he picked it up off the floor?
A. I have absolutely no doubt on that point.
Q. ... I put to you, Staff Wheaton, that Chief MacIntyre under oath here denied a number of times having slipped any statements or anything onto the floor. Are you suggesting that his testimony is incorrect?
A. I'm suggesting, I'm not suggesting, I'm stating the man perjured himself.

In his testimony before us, Chief MacIntyre unequivocally denied concealing any documents.

Transcript, Page 6372

A. I'm testifying now, under oath here, that I never done such a thing, sir.

In addition to these contradictory versions given by MacIntyre on the one hand, and Wheaton and Davies on the other, there is also dispute over a number of other related matters. If we accept that there was such an incident, for example, when did it happen, how many documents were involved and what did they (or it) contain? We heard conflicting evidence on all of these matters.

Let us look first at the question of the number of documents involved. There is a conflict on this point between the handwritten and typed versions of Wheaton's April 16 (we will comment on the question of dates shortly) notes concerning a meeting with Chief MacIntyre. (Exhibit 90(a) and 90(b)) The typed version reads as follows:

Exhibit 99, Page 3

16 April 82
Interview 3:45 Chief McIntyre, Cpl. DAVIES, myself. Chief produced brown accordion file folder containing approximately four manila file folders as well as a number of envelopes. Chief was asked four or five times for any other statements from Patricia HARRIS [sic]. Last statement given - hand written statement of Bill URQUHART. On HARRIS [sic] showed numerous, only one read. Cpl. DAVIES saw *it* [emphasis added] placed on floor, asked numerous times why. PRACTICO [sic] no explanation. No comment on line up. No comment on PRACTICO [sic] re witness. Definitely did not interview EBSARY'S wife or son after murder on 15th. Total correspondence 31 pieces.

Wheaton's handwritten notes read:

Exhibit 90(a) and 90(b)

Hand written statements of Bill Urquhart on Harris [sic] showed numerous only one read Cpl. Davies see *them* [emphasis added] placed on floor.

Staff Sergeant Wheaton was asked about the differences in the two versions.

Transcript, Page 7752

Q. Can you suggest any reason why the "them" would be changed to an "it" in a typewritten version?
A. No, I cannot, sir. It was one piece of paper.
Q. How do you know it was one piece of paper?
A. Because that's what the Chief handed me.
Q. Did you go and look behind the desk and see if there was any more?
A. I stood at the desk. I didn't see any more, sir, no.

There is also conflict over what the document dropped on the floor - if there was such a document - contained. We have the testimony of Wheaton and Davies at the Commission hearings that it was Harriss #1. But Crown prosecutor Frank Edwards' notes contain the following reference dated Saturday, April 17, 1982 - nine days before the date the meeting involving MacIntyre, Davies and Wheaton is supposed to have taken place - concerning both the Harriss #1 statement and an incident in which Wheaton alleged that MacIntyre slipped a document under the desk.

Exhibit 17, Page 9

Sat Apr. 17/82
1:45 p.m. - Wheaton called me at home to say they had almost completed taking statement from Donna Ebsary and we agreed to meet at my office at 2:30 p.m. Also briefed me on what she was saying.
While on phone told me that he and Herb Davies had gone down to see Chief MacIntyre late Friday p.m. and had spent a couple of hours with him. After being pressed Chief turned over previous written statement by Patricia Harris [sic] in which she described someone matching Ebsary. (Wheaton said Chief went scarlet when pressed about this statement) - also turned over November 1971 statements of Mary & Greg Ebsary (probable that R.C.M.P. had seen these during 1971 investigation which is an out for MacIntyre).
Also told me that Herb Davies had noticed Chief slipped some of the information on floor behind desk - believes it was some information with transcript attached relating to threat by Xmas [Tom Christmas] against Pratico - believes there was a charge against Xmas at time.
- Said he also saw Prosecutor MacNeil's notes on Chief's file.
- Left with only statement and a few other papers - still did not demand full file and all information from Chief.

These notes indicate that an episode strikingly similar to the one Wheaton and Davies claim took place on April 26 actually occurred on April 16, but involving far less explosive evidence. Edwards' notes also indicate that Wheaton had Harriss' June 17 statement in his possession on April 16, nine days before MacIntyre allegedly attempted to conceal it from him.

For his part, Wheaton testified that he never told Edwards anything about the Chief hiding material relating to a threat by Tom Christmas against Pratico, but he insisted he reported to Edwards the Harriss #1 incident after it took place on April 26. Edwards denied this.

Transcript, Page 11795

Q. If you have been told that Chief MacIntyre had deliberately tried to conceal from the RCMP that statement of Patricia Harriss, are you able to speculate what you would have done?

A. ... I would have recommended that the Chief be charged with obstruction of justice.

Q. And you're confident in saying today that that was never told to you by either Staff Wheaton or Herb Davies.

A. I'm positive it wasn't.

Another intriguing point: Edwards testified that Wheaton did not seem concerned when he was telling Edwards about Chief MacIntyre's attempt to conceal the Christmas evidence.

Transcript, Page 11793

A. It was casual. "Oh, by the way ... Herb noticed the Chief slip some information on the floor, etc. And when I said, "Well, what was that about?" And he said, "Oh, it was just something related to Thomas Christmas or transcripts that he..." There was no particular concern about it. It was something that I, when he mentioned it to me, I picked him up and said, "What was it about?" But any concern that I experienced was allayed by his response.

Despite the fact that both Edwards' notes and Wheaton's notes indicate this meeting with MacIntyre took place April 16, Wheaton insisted in his testimony that the meeting occurred on April 26 following the issuing of the Attorney General's order. Which date is to be accepted? If the meeting took place on April 16, it would indicate that Wheaton's testimony about the events of his April 26 meeting with MacIntyre was in error.

Edwards testified that he was certain that the meeting took place on April 16. In response to suggestions from Wheaton (Transcript, Page 7711) that Edwards sometimes played "catch up" by making after-the-fact notes based on those already taken by Wheaton, Edwards testified:

Transcript, Page 11792

Q. Now did you ever make the notes that we've been referring to here based on information given to you by Wheaton out of his own notebook?

A. No.

Q. Did you ever play, what he's referred to as, what, "catch-up" from time to time, using Sergeant Wheaton's notes?

A. No.

There is one other piece of evidence that appears to indicate that the meeting involving MacIntyre, Davies and Wheaton occurred on April 16 instead of April 26. It concerns the statements of Mary and Greg Ebsary. In his testimony before the Commission, Wheaton first testified that he received those statements on April 26.

Transcript, Page 7712

Q. When were those statements turned over to you?
A. The 26th of April, 1982, sir.
Q. Did you have them before the 26th of April?
A. Not to my knowledge.

However, other evidence showed that when Wheaton took statements from Mary and Greg Ebsary on April 19, 1982, their statements refer to having read the 1971 statements that day. When this was pointed out to Wheaton, he testified:

Transcript, Page 7714

A. That refreshes my memory further, sir, that I must have shown them statements that I had obtained from the Sydney, from Inspector Scott probably. If I showed them statements and I dated this the 19th of April.
Q. So do we take from that then that you had the Ebsary statements prior to the 26th of April?
A. I must have had them, sir, if I showed them to them, yes.

Based on our assessment of all the evidence before us, we believe that the following is what actually occurred. We believe that Wheaton and Davies visited MacIntyre on the afternoon of Friday, April 16 in order to try to get more information on the case from him. They were given the Harriss statement together with the Ebsary statements. During the course of this meeting, MacIntyre discarded a document relating to Tom Christmas on the floor. We believe MacIntyre did not deliberately try to hide any document and, in particular, did not try to hide Harriss #1.

We believe Frank Edwards' notes that the incident involved Tom Christmas and we accept his recollection of the casual manner in which Wheaton related the incident.

Wheaton testified that the "April 16" date on his own notes was in error. But we do not believe both Edwards and Wheaton would use the same wrong date in their notes. If MacIntyre had deliberately tried to hide a statement on April 26, that would have been in direct contravention of the Attorney General's order and would have been an offence.

Supporting the argument that the meeting took place April 16 is the fact that Wheaton's April 16 notes also seem more like notes of an interview than a formal session to hand over documents to comply with an order of the Attorney General. Indeed, the note itself reads "Interview". And Wheaton's notes refer to discussing John Pratico, the line-up, an interview of Mary and Greg Ebsary and the statements of Patricia Harriss. There is no mention of the order from the Attorney General. Given the importance the RCMP attached to this order and its highly unusual nature, we believe some reference to it would have found its way into Wheaton's notes if the meeting occurred as a result of that order.

We also note that Wheaton never made any written report to his superiors that MacIntyre had attempted to hide Harriss #1. He testified he reported it verbally, but we believe it would have been a sufficiently serious incident to warrant formal reporting. Wheaton not only made no report at the time, but his later reports suggest nothing happened at all.

In May 1983 Wheaton was asked by Scott to comment specifically on improper Sydney City Police Department police practices and procedures relating to their handling of the Marshall case. In his report dated May 30, 1983, he wrote:

Exhibit 20, Page 11

> In reviewing the Sydney City Police file after the order had been made by the Attorney General that they turn over all documentation, I found a partially completed statement dated 17th June, 1971 - 8:15 P.M.

This was the Harriss statement Wheaton alleged had been put on the floor by MacIntyre. When questioned about why he didn't indicate in this report how he acquired the statement, Wheaton testified:

Transcript, Page 7826

> A. I haven't included it there, My Lord. I don't know why I haven't included it there. I can assure you that it did happen. I can only say that, that's the way I wrote it and if I'm remiss, I'm remiss in not including it. I have no explanation other than that, My Lord.

If MacIntyre had deliberately tried to conceal the statement as Wheaton alleged, we believe Wheaton would have reported it. Wheaton wrote in 1986 that Marshall had been the victim of an "unscrupulous" police officer, John MacIntyre. When asked by his superiors to support this statement, however, Wheaton made no mention of the alleged evidence-concealing incident.

Perhaps the most compelling argument against the suggestion that MacIntyre tried to hide the Harriss #1 statement is common sense. If MacIntyre had wanted to hide this particular statement, all he had to do was to remove it from the file prior to his meeting with the RCMP. MacIntyre had clearly gone through the file and had taken the trouble to list all the statements and other information in the file. It is inconceivable that if MacIntyre had deliberately intended to hide Harriss #1, he would have left it in the file during this listing process, read the statement in front of the RCMP officers (testimony of Sergeant Davies, Transcript, Page 8650), and then surreptitiously attempted to place it or drop it on the floor.

The testimony of the two RCMP officers concerning this particular incident was incorrect. It follows that Wheaton's allegation that MacIntyre perjured himself in relation to this incident is also without foundation.

1.8.4 Alleged interference by the Department of Attorney General

Harry Wheaton has suggested on a number of occasions, including in his testimony before the Commission, that the Nova Scotia Department of Attorney General attempted to interfere in the 1982 RCMP investigation of the Marshall case by limiting their efforts to interview key members of the Sydney City Police Department. Wheaton's May 20, 1982 report makes this point.

Exhibit 99, Page 88

> 4. In regards to the Ebsary and Marshall portions of this file, all avenues of investigation known to date have been completed. Discussions were held with Crown Prosecutor, Frank C. Edwards, in regards to interviewing Chief MacIntyre and Insp. Urquhart in regards to the allegations of Chant, Pratico and Harriss that they were induced to fabricate evidence in the original trial in this matter. Mr. Edwards has advised me that he further discussed the matter with Mr. Gordon Gale of the Attorney General's Department, and it was felt that these interviews should be held in abeyance for the present. This file will be held open pending further instructions as well as new areas of investigation which may come to light.

Two years later, when the CBC radio program "Sunday Morning" requested an interview with Wheaton to discuss his work on the Marshall case, Wheaton wrote to his superior, Superintendent A. E. Vaughan:

Exhibit 20, Page 59

> In regards to the above, if I were to answer these questions honestly ... it would undoubtedly cast the Department of Attorney General in bad light.

He was questioned about this during his testimony.

Transcript, Page 7917

> **A.** ...I took it from Mr. [Roger] Bill [of "Sunday Morning"] that he was going to be inquiring into my opinions and, in my opinion, there was waffling by the Department of the Attorney General in regards to, not waffling, we did not get a clear mandate to investigate the matter.
> **Q.** Investigate which matter?
> **A.** The Sydney City Police. The third phase, as I would refer to it, and I felt that that should go on.

During his testimony before the Commission, Wheaton testified:

Transcript, Page 7896

> **Q.** ...When you and Mr. Edwards discussed the matter of not interviewing Mr. Urquhart and Mr. MacIntyre when he advised you that this was the instruction or suggestion from Gordon Gale, was it your opinion that that amounted to interference in your investigation by the Department of Attorney General?
> **A.** ... You're asking my opinion personally, Harry Wheaton?
> **Q.** Yes.
> **A.** Yes, I did.
> **Q.** Why is that?
> **A.** Because I thought, and I expressed it to Mr. Edwards, that the matter should get on the road.

Frank Edwards testified that he had, in fact, also urged the Department of Attorney General to focus the RCMP investigation on the Sydney City Police.

Transcript, Page 11797

Q. Now, what were you meaning by that?
A. Well, two things. Number one, that the file should be obtained, but more particularly that, in my view, the time had long since passed when John MacIntyre and Bill Urquhart should have been taken in individually and questioned thoroughly on their involvement in that '71 investigation by Wheaton and Carroll.
Q. What was the response from Mr. Gale and Herschorn?
A. Mr. Gale was of the view that that matter could wait, that the...that it was something that could be put off. That the main goal now was to get Marshall before the Court in order to secure his release, and that the problem with the file could be expeditiously dealt with because that would be necessary for the immediate purpose by a direction under the *Police Act*.
Q. So...
A. But I mean I didn't argue further with him on that.
Q. Did you agree?
A. No, I didn't agree. I stated what I thought should happen. He said, "No." He was my superior. I wasn't going to say, well, you know, well, "I'm going to order them to go anyway." I didn't have the authority to do that.

Transcript, Page 11816

Q. It was your understanding following your discussion with Gale that there should be no investigation of the Sydney Police until after Marshall had been through the appeal process and perhaps after Ebsary had been tried.
A. That was my understanding but, you know, Gordon Gale may have said not more than, you know, "Let's deal with Marshall first." And then I read into that, well, after we get...
Q. Is that what you intended to convey to Wheaton?
A. Yes. If I may, much has been made of this and the impression has been left that, you know, the RCMP were literally straining at the bit wanting to go after MacIntyre and Urquhart. That is not my recollection.
Q. That's not your recollection?
A. That is not my recollection, and, you know, there was no consternation expressed to me when I advised Wheaton that the matters were to be held in abeyance for the time being.

During his testimony before the Commission, Gordon Gale, Director (Criminal) for the Department of Attorney General, explained why he responded as he did to Edwards' request to investigate the Sydney police.

Transcript, Page 13387

A. Well, my response to Mr. Edwards was that I didn't see the point at that ... right then and there of doing that. I thought that the best thing was that we had made the decision that we would ask the Attorney General to sign the order under the *Police Act*, that I expected that that would be signed. It, in fact, was prepared the next day and it may have been prepared on the 19th and dated the 20th on the basis that the Attorney General was available on the 20th to sign, and that I thought that that should be executed and they should get the whole of the file and look at it to see what was in it that they didn't know about and then after that they could go back and ask any questions at all. But it seemed to me to be a pointless effort to ask questions without seeing what was the whole of the file, because it might raise things that they...other things that they were not aware of or it may ... it would at least allow them to zero in and give some thought as to what questions they did want to ask.
Q. Did you tell him to hold it in abeyance? "Don't worry about an investigation of the Sydney Police now."
A. Well, I may have said to hold it in abeyance until they get the file and...from the Sydney Police and review it.
Q. Well, was it ever your intention to say there was not going to be any investigation of the Sydney Police until the Attorney General's office authorizes it?
A. No, it was not my intention to say that whatsoever.

Q. Do you consider-
A. I just thought it was silly to go ahead with asking questions without seeing the whole of the file and seeing what...what might arise from that.
Q. Do you consider the RCMP would be authorized if they considered a municipal force, or a member of a municipal police force, had conducted some criminal activity that they could go in and do an investigation?
A. Yes.
Q. And would they require the consent of the Attorney General to do so?
A. No, they would not require the consent of the Attorney General, especially not in the situation where they were reinvestigating a case and if there had been some criminal offence in relation to that case, then I would not expect them to look for any type of consent from us.

In light of the evidence before us, we do not believe Wheaton was correct in concluding that the Department of Attorney General had interfered with the RCMP by suggesting that interviews of MacIntyre and Urquhart be placed in abeyance.

In the context of the Marshall reinvestigation, Wheaton already had whatever mandate he needed and required no further instructions to interview Urquhart and MacIntyre. In fact, he had already interviewed a number of Sydney police officers who gave statements, and had been urged by Frank Edwards to interview MacIntyre and Urquhart as well.

In the context of a complete investigation into the Sydney City Police Department, on the other hand, Gale's response is understandable. Marshall's release and acquittal were pressing and unusual matters. The RCMP had not yet received the complete file from the Sydney City Police and Gale also had to consider the possibility of charges eventually being laid against Ebsary.

We conclude there was no interference by the Department of Attorney General in the RCMP conduct of the investigation and that any suggestion to the contrary by Wheaton is erroneous.

1.8.5 Factors influencing the investigation

If Wheaton did not require specific authorization to investigate alleged criminal activity by members of the Sydney City Police Department, why did he not simply go ahead and do it? We believe the RCMP officers charged with reinvestigating the Marshall case were influenced by two factors that had nothing to do with the merits of the case itself.

The first involved the relationship between the RCMP and the provincial Department of Attorney General. Did the RCMP have the right to pursue an investigation into the conduct of a municipal police force on its own or did it need authorization from the Department of Attorney General for such an investigation?

The second was that the investigating officers were members of one police force reviewing the conduct of another police force and were influenced in the conduct of their investigation by their desire to maintain a good working relationship with the Sydney department.

This influence can be seen most clearly in the RCMP decision not to get a search warrant to obtain the Sydney City Police Department file on the Marshall case, even after the investigators decided they were being misled by MacIntyre and even after Frank Edwards suggested strongly that they obtain one.

Earlier, we quoted Wheaton's testimony that "relations between the Mounted Police and Sydney City Police would have went to zilch" if the investigators had "compelled production of any statements in the Chief's possession". (Transcript, Page 7600)

Wheaton's superior, Scott, testified that the "repercussions of [the RCMP] effecting a search warrant" to get the information "didn't make much sense to myself" if the RCMP could persuade the Department of Attorney General to use its powers to force the Sydney City Police to produce the information instead. (Transcript, Page 9257)

Gordon Gale also testified that during discussions concerning the need to get the full Marshall file from the Sydney City Police Department "a lot of questions about police protocol were raised and the distinctions that were being drawn as to whether it was an assistance case or it was their case". (Transcript, Page 13385)

While the RCMP reluctance to press forward independently may be understandable, it is not acceptable. The RCMP oath requires its members to conduct themselves with absolute independence and impartiality. To allow the conduct of an investigation to be influenced to any degree by the person or organization being investigated lessens the integrity of the investigation and invites a perception of unequal treatment.

When the RCMP investigators heard serious allegations that witnesses had perjured themselves as a result of questionable tactics employed by the Sydney City Police Department - allegations that merited the consideration of criminal charges - the RCMP decided it was not their mandate to investigate possible criminal offences committed by members of the Sydney City Police Department.

Scott testified that the RCMP would need "authority" from the Department of Attorney General to conduct such an investigation (Transcript, Page 9223) while Wheaton suggested they would need such permission if the subject of the investigation was a public official.

Transcript, Page 7677

Q. ... is it your normal practice with respect to starting investigations with respect to criminal offences, suspected criminal offences, that you would await direction from the Department of the Attorney General?

A. If that individual is the Chief of Police of a city or town in the Province of Nova Scotia, yes, sir.

Q. Why?

A. Because based on my own experience, having investigated two Chiefs of Police in this Province, that is the direction that they came from. This would be the third and I would expect it to be handled in a similar manner.

Q. Although that may have been done in the past, can you suggest any reason why you should, in fact, await that direction? If you chose to investigate me, you wouldn't wait for the Department of the Attorney General to tell you, would you?

A. No, but if I were to choose to investigate the Chief of Police for the City of Dartmouth I would.

Q. Why?

A. Because he is a public officer and a peace officer and, as such, one would normally expect direction from the Attorney General's Department. You would submit your report outlining what evidence you had as has been done here, and what reasoning you had, and then you would await instructions.

Gordon Gale disagreed.

Transcript, Page 13388

Q. Do you consider the RCMP would be authorized if they considered a municipal force, or a member of a municipal police force, had conducted some criminal activity that they could go in and do an investigation?

A. Yes.

Q. And would they require the consent of the Attorney General to do so?

A. No, they would not require the consent of the Attorney General, especially not in the situation where they were reinvestigating a case and if there had been some criminal offence in relation to that case, then I would not expect them to look for any type of consent from us.

Chief Judge Harry How, who was Attorney General at the time of the 1982 reinvestigation, concurred. (Transcript, Page 10793)

We find that the undue sensitivity of the RCMP in pursuing certain aspects of this investigation is not acceptable. (In a later section of this Report, we will comment in detail on the role of the RCMP in laying criminal charges.)

1.8.6 Wheaton's credibility

During the course of his testimony before this Royal Commission, Wheaton took it upon himself to make unsolicited statements concerning a matter unrelated to the issues under consideration by this Commission. In doing so, Wheaton not only cast unwarranted aspersions on the reputation of an individual but he raised serious questions about his own credibility.

This involved the circumstances surrounding a fire in a motel in Port Hawkesbury owned by Billy Joe MacLean, then a member of the Nova Scotia Cabinet. The RCMP, the insurance adjusters, the Fire Marshall's office and the investigators for the Insurance Crime Prevention Bureau all investigated the cause of the fire, and no charges were laid against anyone as a result of those investigations. The insurance claims were paid.

Despite that, Wheaton's initial testimony left - and appeared designed to leave - the clear impression MacLean had been involved in some sort of criminal activity, and that the Department of Attorney General had provided MacLean with a copy of the report of the RCMP investigation into the fire. On closer examination, however, it turned out that Wheaton's comments were erroneous, unfounded and based on hearsay and inference. For an experienced police officer to make such assertions in a televised public hearing, knowing full well that they will be eagerly reported by the media and that the mere fact of the comments being reported will result in harm to the reputation of the individual involved, is scandalous.

Wheaton made the comments following his testimony about another incident. His May 20, 1982 report on the Marshall case had turned up in the possession of a Liberal candidate during the 1984 Nova Scotia election campaign and, during the course of his testimony, Wheaton was asked whether he knew about the unauthorized distribution of any other RCMP reports. (Transcript, Page 7899) At the conclusion of his direct examination by Commission counsel, Wheaton returned to the issue and volunteered the following:

Transcript, Page 7952

A. My Lord, if I might come back to [Commission Counsel] Mr. Orsborn for one minute.... You asked me this morning, and I've been thinking it over at the lunch period of, 'Do I know of any instances where files, Mounted Police files, were brought forth that went to the Attorney General's Department' and I said, my answer to you was, 'Are you referring to Donald Marshall case or other cases?' And you said 'We'll deal with the Donald Marshall case and come back to other cases.'

Q. Uh-hum.

A. You have not come back to other cases and I would feel it remiss if some other lawyer should pick this item up later, and you think that I was hiding things from the Commission, which I assure, My Lords, I'm not doing. So, that's why I take this opportunity to go back to that question if I may.

Q. Thank you for raising that. Do you know of any such releases of reports?

A. The only one that I can speak to on my own personal knowledge was again in 1982, in March of 1982, and I was requested to assist our Port Hawkesbury detachment in the investigation of a suspicious fire at the Voyageur Motel or Voyageur Restaurant in Port Hastings [sic], Nova Scotia. This fire had started in the central [sic] of the restaurant and was not of electrical nature, and it was the feeling of the investigators that it was a set fire. This restaurant is owned by Mr. Billy Joe MacLean. I went to Port Hawkesbury and I assisted Cst. Joseph Gaudet in the investigation of this fire. In this investigation we were able to place Mr. MacLean at the front door of the restaurant in a blinding snow storm at approximately four to five o'clock in the morning.

Wheaton also testified that he had been told by the NCO in charge of the Port Hawkesbury detachment that the RCMP report about the fire had been given to MacLean himself. (Transcript, Page 7957)

Wheaton clearly implied not only that MacLean had been involved in criminal wrongdoing in connection with the motel fire but also that he, Wheaton, was speaking "on my own personal knowledge". When he returned to the stand the following week, however, Wheaton modified key elements of his story under cross-examination by counsel for the Department of Attorney General.

Transcript, Page 8446

Q. Do you have any explanation as to why you would have said [the incident took place between] '4 and 5 in the morning', Wednesday last?

A. I know it was early in the morning. I know there was a blinding snowstorm. In that area of the country the wind blows very hard down the Strait there, and often traffic is stopped in this type of thing and I think that occurred at that time and it sticks in my mind that it was more early morning and there was a blinding snowstorm.

Q. Is the time of 4 or 5 o'clock in the morning more suspicious than a time closer to 10 o'clock in the morning?

A. I would think so, yes, sir.

Q. I'm advised, Staff Wheaton, that there's not the slightest reference or evidence anywhere of the suspect being seen between 4 and 5 o'clock in the morning at the premises. I ask you whether you wish today to retract your statement made Wednesday last about the time.

A. About the time?
Q. Yes.
A. As I've already told you, yes, I don't know specific times.
Q. You wish to retract what you said last day with respect to the times? That that was ...
A. Yes, sir, I guess so.
Q. Inaccurate and incorrect?
A. Yes, sir.

Wheaton was also forced to concede that he had no personal knowledge that the RCMP report of its investigation had been released to MacLean or any other unauthorized person. (Transcript, Page 8437)

A responsible police officer does not volunteer in a public forum the fact that an individual has been the object of a police investigation if that investigation did not result in a charge being laid. Indeed, a responsible police officer makes sure such information remains strictly confidential. In this case, the police officer embellished the facts of the investigation with inaccuracies and exaggerations.

1.9
The Years in Prison

On July 29, 1982, the Court of Appeal granted an application for bail for Donald Marshall, Jr. By that time, Marshall had been incarcerated, either in the Cape Breton County Jail, Dorchester Penitentiary, the Medium Security Facility at Springhill, Nova Scotia, or at the Carlton Centre halfway house in Halifax, Nova Scotia for approximately 11 years and one month.

The Royal Commission did not review in any detailed fashion Marshall's experience in prison. The correctional and parole systems fall within federal jurisdiction. We did, however, hear evidence from representatives of Corrections Canada and the Parole Service concerning the effect an inmate's claim of innocence would have on an application for parole. At the time Marshall was in prison, Policy 5.7.2 of the National Parole Board's Criteria and Guidelines for Decisions, stated:

Exhibit 150

> Inmates sometimes state their innocence at the panel hearing but the Board's policy is to advise them that the Board must accept the verdict of the Court and that their guilt or innocence is not a factor to be considered at the hearing. Therefore a claim of innocence does not rule out a favorable decision.

A policy of similar effect is in force today.

Corrections personnel, not surprisingly, act on the assumption that people incarcerated are guilty of the offences for which they have been found guilty. If an inmate persists in claiming innocence, this would be regarded as a negative indication that the inmate has not come to terms with his or her guilt.

Diahann McConkey of the National Parole Board testified about this. McConkey, who has been employed by the Parole Board since July 1985, previously worked as a parole officer in Nova Scotia. She was Donald Marshall, Jr.'s parole officer from 1976 to 1979 at Springhill. Although McConkey admitted a claim of innocence was at least a factor in deciding whether a person would be let out on parole, she pointed out that Donald Marshall, Jr. was granted day parole as soon as he became eligible, despite his claim of innocence.

In our view, the following exchanges from McConkey's testimony best sum up the effect of the Parole Board's policy:

Transcript, Page 12577

Q. ... if a man is in jail and has been found guilty of an offence, then you have to assume that he is guilty of the offence. But there is just that small possibility that he may not be guilty of the offence, yet during the entire length of his stay in jail, you have to presume that he is guilty and accordingly get him to come to terms with the factors that led to that offence. You've got to act that way.

A. To a certain extent, yes. And if he does not ever acknowledge his guilt, it may well be seen as one negative factor, but by no means an overriding factor, ever at any time.

Q. But surely, Ms. McConkey, the effect of this approach is that for the prisoner claiming innocence, he has a harder time getting released.

A. I would think so, yes.

Although it is not unusual for inmates to maintain they are innocent for a period of time, McConkey testified that the length of time Marshall maintained his innocence was unusual. His insistence on his innocence also produced aggressive behavior. In January 1978, McConkey noted in a memo:

Exhibit 112, Page 103

> In fact, the Institution [Springhill] recently denied Marshall's request for an escorted T.A. [Temporary Absence] as it is felt that in light of his unstableness at the present time, he represents too high a security risk.

McConkey was asked to comment on Marshall's "unstableness":

Transcript, Page 12536

A. ... there was a period of time when his behavior in the institution was extremely aggressive towards staff, towards myself, towards the other members of the case management team where he, in one case, threw a chair at one of the staff members.

Q. Are you able to offer any insight as to what provoked that aggressiveness?

A. I suspect that it had to [do] with the issue of whether he was guilty or innocent of the crime. Although I was not [putting] a lot of pressure on him to admit that he was guilty, some people were.

Q. Who would those people have been?

A. Some of the other people, members of his case management team who had contact with him far more frequently that I did on a daily basis.

Q. Was it your sense that his frustration in maintaining his innocence in the face of the response that he was guilty was causing this aggression to a degree?

A. ... In retrospect, yes, I would say that that is true. At the time, my belief at the time was that he was coming close to admitting that he was involved in the offence and that that's what was starting to come out.

The Coordinator for Community Resources for the Nova Scotia District, Correctional Services of Canada, Jack Stewart, also testified. In 1982, Stewart was the Superintendent of the Carlton

Centre, a community correctional centre in Halifax run by Correctional Services Canada to facilitate the reintegration of offenders back into the community. Stewart indicated that the Carlton Centre was used primarily as a day parole centre. Donald Marshall, Jr. was at the Carlton Centre from March to July 1982. Stewart was responsible for Marshall at that time.

Stewart provided the Commission with some indication of the loss that was suffered by Donald Marshall, Jr. as a result of having been incarcerated for 11 years.

Transcript, Page 12669

Q. What had he lost over that period of years, in your assessment, when he came out?

A. The normal sort of evolutionary socialization that takes place. You notice it with a lot of long timers. The ability to interact with people. The ability to think in sort of a critical fashion as opposed to necessarily a paranoid fashion. To be a little less focussed. Most fellows that come out, they're focussed very much on rules, regulations. Am I going to get into trouble, etc.. Well, to give you an example, if you consider, take yourself at age 18, 17 or 18, and then consider yourself at age 28 or 29. What are the differences in your life between then and now and what did you learn? And what real situations did you get up against? If you wind up in a community that's a fairly isolated, by design an isolated community, you miss a lot of just the normal socialization.

Q. What sort of things are you talking about?

A. Well, example, a lot of people who've done a long time, men go out and they try and date a woman. If a 28, 29, or 30-year-old man walks up and has the same social skill development as, say, a 17 or 18-year-old, then it becomes obvious fairly quickly. And you find an awful lot of difficulty just in establishing normal male/female relationships, even on a dating basis. Because you don't have the same socialization experience.

Q. Did you sense that in Junior?

A. Oh, yeah. Yeah, very definitely, yeah. You sense that in most lifers that come out.

If he had been an ordinary parolee sent to Carlton Centre, Stewart testified, Marshall would probably have been kept at the Centre for at least six to eight months and then he would have been watched closely by his parole officer for a number of years.

In the case of a person granted full parole, McConkey also noted that the parole officer maintains contact for some period of time.

Transcript, Page 12516

Q. Once they're granted full parole, what then is the nature of the involvement of the parole officer with that person?

A. It varies with the parole officers, but normally the parole officer would maintain quite close contact, perhaps on a weekly basis, maybe more often, for six months to a year and then it would be gradually cut back more and more, and assuming the individual was doing well.

Q. So, that in … so generally in the hypothetical, a person could expect to have pretty regular contact with the parole officer either in the day parole facility or on full parole for about three years. Is that fair to say?

A. Yes.

Q. What happens after the three year period then?

A. The parole officer would begin to cut back on the level of contacts to maybe once every three weeks for a couple of months, then maybe once a month, eventually once every couple of months. After about five years on full parole, not day parole.

Q. This is now eight …

A. Which is eight …

Q. Seven or eight altogether.

A. Seven or eight altogether since the individual got out.
Q. Right.
A. The parole officer could, and if everything was going well, would go back to the Parole Board requesting what's called "parole reduced."
Q. Uh-hum.
A. If parole reduced is granted, and usually it is granted if the parole officer is requesting it, then the … all of the conditions of parole are removed with the exception of the requirement to keep the parole officer informed of your address and to report once a year. That continues forever.
Q. During that eight year period, is the involvement or is the role of the parole officer twofold, at least in the sense that you're watching the person to see how they're doing. I take it that would be the case.
A. Yes.
Q. But are you also there to help that person through any problems that they might have?
A. Yes.

Early in July 1982, Marshall, who had been working with the Department of Indian Affairs and Northern Development, indicated that he wanted to live in the community. Stewart's note of this request is telling.

Exhibit 112, Page 215

At this point, we are not fully prepared to support this request and are intent on protecting subject from himself and others, thus allowing subject to adjust more easily in the free community.

Stewart commented on this note as follows:

Transcript, Page 12686

A. Yeah, he wasn't ready at that time. He was too new out.… He was not able to cope with some little things. You know, some of the timing aspects. Just some of the things we saw with him sort of going back inside himself. We wanted to make sure that if he was undergoing any kind of stress, we had him close by. That's what we were looking for.

Three weeks later, Marshall's bail application was granted.

Transcript, Page 12687

Q. Was he, in your view, was he any more ready to be out on July 29th than he was on July 5th when you made this note?
A. No.

Ironically, because he was now considered to be out on bail, he ended up back on the street with none of the supports ordinary parolees have available. McConkey was asked to comment on the effect that lack of such a parole system would have had on Donald Marshall, Jr. and his reintegration into society.

Transcript, Page 12518

A. I can only express my opinion, but my opinion from knowing Donald Marshall inside would be that he would have a lot of difficulties.… He was an individual who it would have been easy to take advantage of. He was very soft spoken. He had a lot of mistrust, I guess for obvious reasons, but a lot of mistrust of the system. So it would be difficult for him to ask for help if he needed help… from the correctional system, from social agencies not involved with corrections even.… He had a lot of pride and independence, which would also make it difficult for him to say, "I can't manage."
Q. In your view, would he have needed help?
A. I would think he would. He was quite young when he came into the penitentiary system and became very much involved in the penitentiary system as it's a

> survival mechanism. If you know you're going to be there for quite a while, you adapt and he adapted.

Having entered prison as a 17-year-old boy in 1971 and then having spent 11 years there for a crime he did not commit, Donald Marshall, Jr., 28, was out on the street again in July 1982. Because he had been released on bail, however, he received none of the institutional assistance he would have been entitled to if he, in fact, had committed the crime for which he had been imprisoned and been released on parole. The bitter irony is that the system, which had failed Donald Marshall, Jr. on so many occasions in the past, failed him again even as it sent him back into society.

This is not the fault of the corrections system, which is geared to assist offenders reintegrate into society but cannot logically exercise control over those who are not guilty of any crime. The system is simply not set up to deal with the unique situation in which Marshall found himself. While that is understandable, it is nonetheless difficult to imagine a more tragic circumstance.

1.10 Setting up the Reference

We find:

- that it is regrettable that the Attorney General of Canada was influenced by Chief Justice MacKeigan's views in his decision to hold the Reference under Section 617(b) [now Section 690(b)] of the *Criminal Code* rather than Section 617(c) [now Section 690(c)].
- that the decision to proceed under Section 617(b) precluded a complete examination of why the wrongful conviction occurred.

When it became clear that the RCMP reinvestigation had established Marshall's innocence, Stephen Aronson wrote to federal Justice Minister Jean Chrétien on March 26, 1982 informing him that he intended to apply for relief for his client under "one of the available sections" of the *Criminal Code*. Aronson said he wanted Marshall "acquitted" and not merely pardoned, because a pardon might leave the impression that his client had actually committed a criminal act but had been forgiven for it.

Douglas Rutherford, then Assistant Deputy Attorney General for Criminal Law in the federal Department of Justice, testified he became involved in the Marshall case shortly after the Minister received Aronson's letter. He talked with provincial officials, including Gordon Gale and Frank Edwards, who informed him that Marshall's conviction "was fraught with doubt ... and that some remedy was required." (Transcript, Page 9668)

The remedies available to the Minister were contained in Section 617 of the *Criminal Code* (since changed to Section 690). That section states:

> The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,
>
> **(a)** direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

> **(b)** refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be;
>
> **(c)** refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

If the Minister of Justice proceeded under Section 617(b), the onus would be on Marshall to prove his innocence. Under Section 617(c), however, the Minister could ask the Court to examine certain questions relating to the case, which might have opened the door, for example, to a complete examination of police behavior in obtaining Marshall's conviction.

On May 17, 1982, following consultations with his staff, Nova Scotia Attorney General Harry How recommended to Chrétien that he should not pardon Marshall but should instead refer the issue to the Court of Appeal as a Reference. He recommended that the Reference be under Section 617(b). (Exhibit 124, Page 54) It is not clear whether How and his staff considered the relative merits of asking for a Reference under Section 617(c) or under Section 617(b).

Chrétien replied on May 31, 1982 (Exhibit 124, Page 60) and agreed that the matter should be referred to the Court of Appeal. He did not mention any specific section, but the letter contemplated the possibility of "executive action" (Cabinet action) following the decision of the Court, thus indicating that he believed the final disposition of the matter would rest with the federal Crown and not with the Court. Chrétien indicated that, should Nova Scotia agree with this proposed course of action, their respective officials would discuss "the details of the proposed reference".

Rutherford testified that following a meeting with Edwards and Gale on June 9, he believed that officials in both the federal Department of Justice and the provincial Department of Attorney General agreed that a Reference under Section 617(c) was the "preferred option".

Following further discussions involving Rutherford, Gale and Aronson, this preferred option was presented to Chrétien on June 15. Chrétien agreed to it and instructed that the paperwork be finalized. However, the Minister's executive assistant, Jacques Demers, suggested Rutherford advise the Chief Justice of Nova Scotia of the forthcoming Reference as a matter of courtesy. Demers contacted Chief Justice Ian MacKeigan and read him the proposed draft of the question. Rutherford testified that, to his recollection, the question under consideration was:

Transcript, Page 9703

> Does the additional evidence warrant any action being taken in relation to the conviction and, if so, what in the opinion of the Court should be the nature of that action?

The Chief Justice expressed "real concern over whether that would work" (Transcript, Page 9705) and, in later conversation with Rutherford, wondered whether the Court could hear fresh evidence under Section 617(c). Rutherford referred the Chief Justice to the Gorecki case (*Reference re R.* v. *Gorecki (No.1)* (1976), 14 O.R.(2d) 212), a decision of the Ontario Court of Appeal, which had confirmed the ability to hear fresh evidence on a Section 617(c) Reference.

Mr. Rutherford continued:

Transcript, Page 9707

> A. ... And, at that point the Minister, Mr. Chrétien, was advised that what had appeared to be a decision in the morning to go a certain route was now in jeopardy as to its wisdom. We got his direction to put everything on hold and to come back with fuller advice on what he should do. We took a good hard look at *Gorecki*, the discussion in the Court of Appeal of Ontario's judgement there reflects a discretion in the Court to hear evidence even on a reference under Sub C, but to put it in its simplest form I think we thought why tilt with additional problems. If there may be problems, the object of this thing is to get this case back before the Courts in a way that the Court could look as broadly as it thought appropriate at as much evidence as it thought was appropriate, and if Sub B clearly invoked the powers of the Court of Appeal under 610 of the Code to do that, why didn't we just alter it to a Sub B, and that was our ... that was our decision to advise the minister that maybe a quick redrafting of that reference would be a good idea.

The Reference was quickly redrafted to reflect a Section 617(b) Reference which left the matter with the Court of Appeal for final disposition. (Exhibit 124, Page 64) Rutherford telephoned Aronson to advise of the discussion with the Chief Justice, and indicated that the Minister had agreed to proceed under Section 617(b). Aronson testified that he would have preferred a Section 617(c) Reference, with the final decision on disposition of the case being left with the federal Minister.

As a practical matter, this decision to refer under Section 617(b) left Marshall with the burden of preparing and presenting the case to prove his own innocence. This reinforced the adversarial nature of an appeal, and it served to limit the issues canvassed before the Court. Although both governments felt that a full public airing was essential, the Section 617(b) appeal effectively confined the public hearing to the facts of the incident, and precluded a complete examination of why the wrongful conviction occurred.

Given that all parties agreed that a Section 617(c) Reference was preferable, that fresh evidence should be admitted, that a full airing of all issues was necessary, and that appropriate executive action could follow with respect to any or all of those issues, we believe it is regrettable that officials in the Department of Justice were influenced by the views of the Chief Justice in determining the final form of the Reference.

By using Section 617(b), the possibility of a new trial was raised, an outcome which no one wanted; of perhaps more importance, the evidence would be directed solely at guilt or innocence, and not to the factors leading to the wrongful conviction.

1.11 Reference Decision

We find:

- that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.

- that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.

- that the Court took it upon itself to "convict" Marshall of a robbery with which he was never charged.

- that the Court was in error when it stated that Marshall "admittedly" committed perjury.

- that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.

- that the Court's suggestion that Marshall's "untruthfulness...contributed in large measure to his conviction" was not supported by any available evidence and was contrary to evidence before the Court.

- that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.

- that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.

- that the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

- that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.

On June 16, 1982, the Honorable Jean Chrétien, the Minister of Justice and Attorney General of Canada, forwarded the formal Reference to Chief Justice Ian MacKeigan of the Court of Appeal. It said that:

> *Whereas* evidence was subsequently gathered and placed before the undersigned which appears to be relevant to the issue of whether Donald Marshall, Jr. is guilty of the crime of which he stands convicted.
> *And Whereas* application for the mercy of the Crown has been made on behalf of Donald Marshall, Jr., pursuant to Section 617 of the Criminal Code.
> *And Whereas* the Attorney General of Nova Scotia and counsel acting on behalf of Donald Marshall, Jr. agree with the undersigned that this new evidence is of sufficient importance to be considered by this Honourable Court.
> *Now Therefore*, the undersigned, pursuant to paragraph 617(b) of the Criminal Code, hereby refers the said conviction to this Honourable Court for hearing and determination in the light of the existing judicial record and any other evidence which the Court, in its discretion, receives and considers, as if it were an appeal by Donald Marshall, Jr.

On October 5, 1982, the Court agreed to a request from Marshall's counsel, Stephen Aronson, to hear new evidence from seven witnesses - Donald Marshall, Jr., James MacNeil, Donna Ebsary, Patricia Harriss, Maynard Chant, Greg Ebsary, and Adolphus Evers, the RCMP forensic expert. Once findings of fact have been made by the lower Court, an appellate court normally considers only questions of law, but Aronson argued successfully that the circumstances in this case were different. He asked the Court to sit as a trier of fact because there was new evidence that "bears upon a decisive or potentially decisive issue in the trial," and that this evidence, if it had been believed by the Court at Marshall's original trial "could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

At the same time, the Court reserved decision on a Crown request to hear oral evidence from John MacIntyre, William Urquhart and Wayne Magee, the Louisbourg Chief of Police. It also reserved decision on whether to receive in evidence any of the affidavits - including ones from Rosenblum, Khattar, Chant, Harriss, Pratico, Dr. M. A. Mian (Pratico's psychiatrist), Gushue, James MacNeil, MacIntyre, Urquhart and Magee - that had already been tendered and filed.

On December 1 and 2, 1982, the Court heard the evidence of Marshall, James MacNeil, Donna Ebsary, Patricia Harriss, Chant, Greg Ebsary and Evers. The Crown withdrew its application to hear evidence from the police officers and made an application to tender their affidavits instead. The Court turned down the application. The Court rendered no decision on whether to admit any of the other affidavits filed except for the July 22, 1982 affidavit of Patricia Harriss, which was entered as Exhibit 5. It also appears from the reasons for judgment that the judges admitted the affidavits of Pratico and Dr. Mian by consent of counsel. (Exhibit 4, Page 129)

What that means is that, at the conclusion of the hearing on December 2, the Court had before it oral evidence from seven witnesses and the affidavits of Patricia Harriss, John Pratico and Dr. Mian, the transcript of the 1971 trial and assorted physical evidence.

After receiving written arguments from both Marshall's counsel and Crown counsel, the Court heard their oral arguments on February 16, 1983. Nearly three months later, on May 10, 1983, the Court released its decision in the Reference. Marshall's 1971 conviction was quashed and a verdict of acquittal entered.

The Court concluded that in light of all the evidence before it, "no reasonable jury could, on that evidence, find Donald Marshall, Jr. guilty of the murder of Sandy Seale". It continued:

Exhibit 4, Page 144

> We must accordingly conclude that the verdict of guilt is not now supported by the evidence and is unreasonable and must order the conviction quashed. In such a case a new trial should ordinarily be required under Section 613(2)(b) of the *Criminal Code*. Here, however, no purpose would be served in so doing. The evidence now available, with the denials by Pratico and Chant that they saw anything, could not support a conviction of Marshall. Accordingly we must take the alternative course directed by Section 613(2)(a) and direct that a judgment of acquittal be entered in favor of the appellant.

The Court noted that this disposition agrees with the submission of Crown counsel, and stated:

Exhibit 4, Page 145

> Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside.

This was the only issue before the Court, and its setting aside of the conviction ended that issue. Inexplicably, however, the Court continued:

Exhibit 4, Page 145

> Any miscarriage of justice is, however, more apparent than real.
> In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged....
>
> There can be no doubt but that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction....

Exhibit 4, Page 143

> However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James MacNeil's story...

This Commission has carefully examined the Court's judgment in the light of the record before the Court. We believe the Court made a serious and fundamental error when it placed the blame on Donald Marshall, Jr. The Court reached conclusions unsupported by evidence and either ignored or refused to hear evidence that would have been critical of anyone other than Marshall. In so doing, the Court not only appeared to be acquitting Marshall with the greatest of reluctance, but it also absolved the criminal justice system of any responsibility for his wrongful conviction and imprisonment.

Because the matter came before the Court under Section 617(b) of the *Criminal Code* "as if it were an appeal" by Marshall, the only issues for the Court to decide were: whether the initial conviction should be set aside and, if so, on what ground; and whether a verdict of acquittal should be entered or a new trial ordered. The issue was not one of affixing blame for the original conviction; indeed, to fix blame would require that that question be specifically put to the Court and all relevant evidence placed before it.

The Court of Appeal's gratuitous comments, which were not relevant to the acquittal, created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful imprisonment and also in terms of public acceptance of his acquittal. These difficulties were recognized in both the majority and dissenting judgments of the Supreme Court of Canada in its 1989 decision on judicial immunity referred to below. As Mr. Justice Cory put it - (in dissent, but not on this point):

> Upon his acquittal, Marshall was eventually paid some $250,000 by the Province of Nova Scotia and in return he executed a complete release of all claims he might have had against the government. Not unexpectedly it appears that the derogatory comments made by the Court of Appeal quoted above had an adverse impact on the quantum of compensation which was paid to Marshall. Despite these adverse comments, Marshall as the successful appellant could have no recourse by further appeal.

Madam Justice McLachlin, speaking for the majority, said:

> It is evident from the materials before the Court, however, that the comments of the Court of Appeal had an impact on the *quantum* of that payment.

In addition to the unnecessary and unwarranted comments in the Reference judgment, we were also concerned about certain other issues related to the Court of Appeal's disposition of the Marshall case. There is a significant difference between what the Court of Appeal judgment says and what Chief Justice Ian MacKeigan wrote in a private letter forwarding the decision to Jean Chrétien, the Minister of Justice. The judgment stated that any miscarriage of justice was "more apparent than real". The letter of transmittal read - "We also expressed an opinion on the many factors which led to this miscarriage of justice within the judicial system." That difference needed to be resolved.

Then too, we had serious concerns that Mr. Justice Leonard Pace, who was Attorney General at the time of Marshall's original conviction, sat as a member of the panel hearing the Reference. Further, we wished to determine precisely what was the record before the Court. To quote again Mr. Justice Cory of the Supreme Court of Canada - (in dissent, but not on this point) - "It is difficult if not impossible to determine what material or affidavits made up the record of the Court upon the Reference."

In an effort to obtain evidence relevant to these three issues, Commission counsel wrote to the judges who heard the appeal and requested that they testify before the Commission. The judges refused and subpoenas were issued. The necessity for the judges to appear in response to the subpoenas was contested in court, and eventually, by majority judgment rendered on October 5, 1989, the Supreme Court of Canada ruled that the Commission could not question the judges with respect to these issues. Accordingly the views that follow are based on our assessment of a review of the court files, the written reasons of the Court of Appeal and Chief Justice MacKeigan's letter of transmittal. All of these materials are public documents, and as noted by Mr. Justice Cory:

> A judgment and a judge's reasons for judgment must be put on record and are subject to scrutiny on appeal by the legal community and by the public at large.

1.11.1 The robbery theory

The Court of Appeal concluded that Donald Marshall, Jr. had been engaged in an attempted robbery at the time Sandy Seale was murdered. From that initial finding, the Court drew a number of conclusions. The first was that Marshall was therefore guilty of "evasions, prevarications and outright lies". (Exhibit 4, Page 143) The Court did not indicate what Marshall's "outright lies" were, but presumably the Court accepted Jimmy MacNeil's evidence that the murder was the result of a struggle that occurred during an attempted robbery and rejected Marshall's evidence that no robbery or attempted robbery took place. If this, in fact, is the case, the Court took it upon itself to "convict" Marshall of an offence - committing a robbery - with which he was never charged.

During the Reference hearing, Marshall's Dorchester statement concerning the alleged robbery was admitted into evidence. We have dealt elsewhere with the circumstances surrounding this document. Suffice it to say that this statement would likely have been rejected as involuntary if Marshall had actually been on trial for robbery.

Despite the Court's conclusion that Marshall "admittedly" committed perjury, Marshall at no time admitted perjuring himself at trial. He testified at the Reference, in fact, that he made no mention of the robbery at his 1971 trial because no robbery had occurred.

Having concluded that Marshall was involved in a robbery attempt, the Court then took it upon itself to blame him for not confessing to this criminal offence - one with which he had not been charged - in order to win his freedom on another charge, of which he was not guilty.

Exhibit 4, Page 145

> By hiding the facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defence available to him, namely, that during a robbery Seale was stabbed by one of the intended victims. He now says that he knew approximately where the man lived who stabbed Seale and had a pretty good description of him. With this information the truth of the matter might well have been uncovered by the police.

The Court's characterization of the "robbery" as being the "only defence available" to Marshall is curious in the extreme. Surely in our criminal justice system there is no onus on an accused to develop a defence. Surely the onus and obligation on the part of the Crown is to bring forward truthful evidence which, if accepted, will support the conviction. How can an accused be blamed if he is convicted on the basis of perjured testimony?

The Court went on to suggest that Marshall was to blame for his own conviction because he failed to provide police with a "pretty good description" of Ebsary or to tell them where he lived. Marshall was cross-examined about this by Crown counsel Frank Edwards during the Reference hearing:

Exhibit 3, Page 62

> **Q.** The point is, Mr. Marshall, isn't it true that if you had made some efforts you could have discovered who those two fellows were? It's likely you would have discovered who they were?
> **A.** On my own, I probably would have.
> **Q.** But you really weren't interested in finding out who they were at the time, were you?
> **A.** I was scared to death. It's not - I'm not a policeman. It's not my job to investigate. I told them who they were. I wasn't sure where they lived. It wasn't up to me to go look for them.

The Court stated that if Marshall had been more forthcoming, "the truth of the matter might well have been uncovered by the police." This totally ignores the fact that Marshall did provide police with an accurate description on May 29, 1971. It also ignores the fact that Patricia Harriss' June 17 statement contained a similar description. It also ignores the following paragraph from John MacIntyre's affidavit which, although not admitted as evidence, was filed with the Court along with other affidavits, some of which were referred to in the judgment:

Exhibit 134, Page 81

> **25.** That I am aware of the statement, attached hereto as Exhibit 'I', of George MacNeil and Sandy MacNeil, wherein they describe two men whom I now know could have been the above named Ebsary and the MacNeil referred to in the next paragraph hereof, but which statement appeared at the time to have been superseded in importance by those subsequently taken from the aforementioned Chant, Pratico, and Harris [sic].

We can think of no legitimate reason why the Court would blame Marshall for the police's failure to find Ebsary and MacNeil.

Referring to the evidence of Jimmy MacNeil, the Court states:

Exhibit 4, Page 114

> His evidence was unknown to the appellant's counsel, and in the light of their client's instructions could not have been discovered by them with reasonable diligence before the trial.

The Court is apparently saying that MacNeil could not have been discovered prior to the 1971 trial even if Marshall's counsel had exercised due diligence. But the Court - without explanation - blames Marshall's lawyers' inability to find MacNeil on Marshall's instructions to his counsel.

At the same time, the Court does not deal with the far more significant - and real - failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel. Nor did the Court comment on the failure of the Crown to disclose to defence counsel the statements taken from MacNeil and others on November 15, 1971. This information came to light while Marshall's appeal was pending and we have already concluded that the Crown was obliged to disclose this information. We believe that defence counsel armed with this new information would in all likelihood have successfully argued for a new trial.

1.11.2 Non-disclosure

In another part of its decision, the Court of Appeal states:

Exhibit 4, Page 141

> There was also evidence before us to the effect that counsel for Marshall at the time of his trial had no knowledge of the prior inconsistent statements given to the police by Chant, Pratico and Harriss.

The Court had available to it the affidavits of Khattar and Rosenblum each of which contained the following statement:

Exhibit 134, Page 132

> **11.** That every possible effort was made at trial to obtain the truth from the witnesses Maynard V. Chant, John L. Pratico and Patricia Ann Harriss, but there was no indication at that time that they were willing to change their original testimony, and I believe that if evidence of the contents of the Statements and Affidavits referred to herein, had been adduced at trial, then the jury might reasonably have been induced to change its views regarding the guilt of Donald Marshall, Jr.

This is a clear opinion by Marshall's trial counsel that Marshall may well have not been convicted had those statements been disclosed. The non-disclosure by the Crown thus contributed in large measure to the conviction, but the Court not only chose not to comment on responsibility for this non-disclosure, but it also still chose to blame Marshall and Marshall alone.

1.11.3 Police pressure

The Court's suggestion that Marshall's "untruthfulness … contributed in large measure to his conviction" is a conclusion which cannot be supported. Not only is it a conclusion not borne out by any available evidence, it is contrary to evidence before the Court.

The Court was aware that Marshall was convicted on the basis of perjured evidence from Pratico, Chant and Harriss. The Court was also aware that Marshall could not be held responsible for the existence of this perjured evidence. To the contrary, the evidence strongly suggested that it was secured through police pressure.

In previous sections of this Report, we have dealt with the issues of police tactics in questioning young and impressionable witnesses and of pressuring witnesses to change their testimony. Although the Court chose not to hear police witnesses or admit their statements into evidence, much of the evidence we considered was also available to the Appeal Court.

Maynard Chant, for example, testified at the Reference concerning the untrue statement he gave to police on June 4:

Exhibit 3, Page 178

A. First of all I was - I was scared. The second of all, I felt pressured into giving a statement that I didn't normally want to give which caused me to give the different statement to what I'm giving today.

Exhibit 3, Page 185

A. And that's when they - just after that, they put my mother out of the room where I was being questioned and they begin - my probation officer was there and they begin to tell me my record of probation and the trouble that I was into and they told me again about the young fellow that had seen me there. I told them I - that's when I opened up and begin to tell them I never seen nothing. One of the men leaned over and said: "You had to see something. Tell us what you saw." I told him again I didn't see nothing. It went on like that. Then they - I said: "What did the other fellow see?" I don't remember if they told me what the other fellow seen but I remember somehow or another getting a statement - giving a statement concerning what the other fellow had seen to correspond with the statement that I had given falsely that day.

The Court in its reasons chose to ignore Chant's evidence on the source of the pressure being exerted on him. (Exhibit 4, Page 129)

At the same time, while the Court reproduced Patricia Harriss' June 17, 1971 statement to the Sydney police and had available to it her affidavit, with statements attached (Exhibit 5), the Court made no reference either to the non-disclosure of the first Harriss statement or to the reasons why Harriss lied at trial. The Court however did have the following evidence of Patricia Harriss before it:

Exhibit 3, Page 145

A. Through the long hours of being in the police station, my statement was changed and I was scared and didn't want to mention it.
Q. Mention?
A. The two gentlemen I had seen.
Q. Why were you afraid?
A. There was long hours of going over it and the word "perjury" was brought up a lot and they didn't seem to believe that I had seen these two characters.
Q. Yeh, now when you're saying "the word 'perjury' was brought up," who brought up that particular word?
A. The detectives.
Q. Do you recall who those detectives were?
A. I recall Sergeant Urquhart. The other I don't.
Q. You've also indicated fear. Can you account for your feeling of fear?
A. I was young. I didn't understand and it was a long time of going over and over what had happened that night.

Exhibit 3, Page 170

Q. So when you gave your second statement on the morning of June 18th, 1981 [sic], would it be fair to say that you gave that statement because you were tired and you wanted to get out of the police station?
A. Yes.
Q. Not because anybody told you that you had to give that statement in that way?

> A. The statement that I gave wasn't the statement that I started off with and that I wanted to - that I tried while I was there for so long and wanted to say.

The following is contained in Patricia Harriss' affidavit, which was admitted as Exhibit 5 by the Court of Appeal:

Exhibit 134, Page 47

> 6. That I recall the night of June 17, 1971, vividly and that the said MacIntyre and Urquhart continuously went over my knowledge of the events of the evening of May 28, 1971, and repeatedly told me what I should have seen on that evening in Wentworth Park.
>
> 7. That again on the night of June 17-18, 1971, I was interviewed by the said MacIntyre and Urquhart and gave to them a signed written statement at 1:20 a.m. on June 18, 1971, after having been with them continuously for over five hours, and that a copy of the said statement is produced herewith and marked Exhibit "B".

Although John Pratico's affidavit of July 15, 1982 in which he says he did not witness the killing, was admitted by consent of both counsel, the Court of Appeal omitted any reference to the following paragraph in Pratico's affidavit:

Exhibit 134, Page 28

> 9. That I stated I had witnessed the murder of Sandy Seale, as referred to in Exhibit 'C' herein, as a result of the said John F. MacIntyre accusing me of having been a witness to the murder and threatening to jail me unless I stated I did witness the murder and I was further informed by the said MacIntyre and Urquhart as to what I had purportedly witnessed of the murder and agreed, out of fear, with them.

The Court of Appeal reviewed Pratico's May 30 statement and a 1982 affidavit from Dr. Mian, which states that Pratico was admitted to the Nova Scotia Hospital for psychiatric problems in August 1971 and that in 1971 he was, in the psychiatrist's opinion, "a wholly unreliable informant and witness with regard to any subject or event". The Court omitted any comment on the propriety of the Crown using Pratico as a witness or failing to disclose to defence counsel the fact that he was in the Nova Scotia Hospital and that he had given a statement on May 30.

1.11.4 Inconsistent statements

The Court of Appeal had before it evidence that Chant, Pratico and Harriss had provided inconsistent statements. The Court of Appeal reproduced in full Maynard Chant's May 30, 1971 statement. At the Reference, Chant was cross-examined to a limited extent on the May 30 and June 4 statements. Neither of the statements, nor Chant's affidavit, was actually admitted as evidence.

Referring to Chant's May 30 statement the Court stated:

Exhibit 4, Page 127

> No reference to this statement was made at the trial and counsel for Donald Marshall, Jr. did not know of its existence.

This ignores the fact that under cross-examination at trial Chant admitted having told the police an untrue story on May 30. The particular exchange between Rosenblum and Chant was in fact highlighted in the Reference decision at page 102.

The record of the Reference hearing shows that there was no evidence before the Court that Marshall's counsel did not know of the existence of the May 30 statement. The only possible source of this information that we can ascertain is the affidavits filed by Khattar and Rosenblum. (Exhibit 134, Page 129) However, these were not admitted as evidence. Indeed the transcript of the Reference confirms that (with the exception of the affidavit of Patricia Harriss) none of the affidavits was filed with the Court:

Exhibit 3, Page 154

> *Mr. Edwards:*
> My Lord, is the original affidavit filed with the Court there in reference to her?
>
> *The Court:*
> This has not been received. It has not been filed, none of the affidavits.

1.11.5 Trial errors

The Court of Appeal also reviewed the trial evidence concerning Pratico's examination following the incident in the hall at the court house, during which he recanted his claim to have seen the murder. The Court of Appeal reproduced Pratico's re-examination by the Crown and by the Court, and included extracts referring to Pratico's fear for his life. But the Court of Appeal made no reference to the error by the trial judge in limiting the cross-examination of Pratico. (Exhibit 4, Page 114)

We stated earlier that a full and complete cross-examination of Pratico almost certainly would have led to Marshall's acquittal at trial. We also stated that in our view an appeal court has an obligation to review carefully the complete record before it and to require argument on any significant errors. The error in limiting the cross-examination of Pratico should have been apparent to the Court of Appeal and the serious effect of the error should have been recorded.

1.11.6 Conclusion

We find it incomprehensible that the Court of Appeal failed to identify the perjured testimony and its source and the non-disclosure by the Crown of inconsistent statements as the key contributing factors to Donald Marshall, Jr.'s conviction, and then suggested Marshall contributed "in large measure" to his own conviction. The thrust of the Court of Appeal's gratuitous comments in the last two pages of the judgment is to pin the blame on Marshall for his conviction and to ignore any evidence which would suggest fault on the part of the criminal justice system. The decision amounted to a defence of the system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

The Court of Appeal's decision to defend the system is all the more extraordinary in view of its refusal to hear evidence from the police. The police affidavits were not received into evidence and no oral testimony was given by the police. In our legal system, any decision to affix blame or responsibility requires a full airing of the evidence on all sides of the issue; scrupulous adherence to elementary principles of fairness and testing of the evidence by cross-examination provides a sound foundation on which to base a decision. Indeed, in its reasons for judgment, the Court of Appeal referred to the position taken by Crown counsel on Aronson's application to tender fresh evidence. The Court of Appeal noted that Crown counsel agreed that all evidence should be before the Court.

Exhibit 4, Page 82

> On October 5, 1982 a motion was presented to the Court by counsel for the appellant, requesting the Court to hear fresh evidence, which was alleged to be highly relevant to the guilt or innocence of the appellant. Counsel for the Crown did not oppose this application, since it was felt that the evidence tendered should be made available to the Court, and stated that the Crown would be content to ensure that the Court got a full and balanced account of all the events which led to the death of Sandy Seale in 1971 and the subsequent conviction of the appellant in November of that year.

Unfortunately, the Court of Appeal found Marshall to be responsible for his conviction after ignoring evidence to the contrary and after refusing to hear all evidence relevant to the issue of responsibility.

A fair reading of the judgment indicates that the Court of Appeal found there to be no miscarriage of justice. The conviction was quashed on the basis that it was now unsupported by any evidence (Section 613(1)(a)(i)). It was not quashed on the ground that there was a miscarriage of justice (Section 613(1)(a)(iii)). The Court of Appeal also said that any miscarriage of justice was "more apparent than real".

As we have said, we are at a loss to understand how the Court of Appeal could conclude that there was no miscarriage of justice when, on the evidence before it, Marshall's conviction was secured by perjured testimony obtained through police pressure, and his counsel were precluded from full cross-examination because of lack of disclosure by the Crown.

For any citizen to spend 11 years in a federal penitentiary for a crime he did not commit constitutes - even in the narrowest sense - a miscarriage of justice in the extreme.

1.11.7 Letter of transmittal

The Court of Appeal's reasons were made public on May 10, 1983, and its gratuitous comments have haunted Marshall ever since. In his private letter transmitting the decision to the Minister of Justice on May 10, 1983, Chief Justice MacKeigan wrote:

Exhibit 126

> We also expressed an opinion on the many factors which led to this miscarriage of justice within the judicial system.

This private expression of the Chief Justice that there was a miscarriage of justice was in direct conflict with the public reasons which indicated that there was no miscarriage of justice. The "many factors" leading to the miscarriage are not enumerated in the judgment. Although the Reference did not require the fixing of blame or responsibility for the original conviction, the Court of Appeal chose to blame Marshall. It is our view that, based on the evidence before it, the Court's conclusions as to Marshall's fault are unwarranted and without foundation.

1.11.8 Mr. Justice Leonard Pace

We are also concerned about the fact that Mr. Justice Pace was a member of the panel of judges who heard the Reference. Mr. Justice Pace was Attorney General in 1971 at the time of Marshall's original conviction and appeal.

In our view, Justice Pace should not have sat on the Reference. Counsel were evidently unaware of Justice Pace's 1971 position. However, even in the absence of a request from counsel, the perception of absolute impartiality and fairness demands that a judge who, by virtue of an earlier position, bears some or all of the responsibility for the matter now before the Court, refrain from any involvement in the matter as a judge.

The propriety of Justice Pace's sitting as a judge on matters arising during his tenure as Attorney General was graphically brought into focus by the testimony of Dana Giovannetti. Giovannetti, a solicitor with the Halifax office of the Department of Attorney General, is to be commended for his professional integrity in bringing to the attention of the Commission, through counsel for the Department of Attorney General, evidence critical of a Supreme Court Justice. Giovannetti testified that as Crown counsel on the appeal arising from the third Ebsary trial, he became aware that Justice Pace was to be one of the panel of judges hearing the case. The appeal involved both conviction and sentence. Giovannetti was concerned about the perception of the former Attorney General sitting on the appeal, and contacted Chief Justice Lorne Clarke, who arranged for another judge to sit on the panel. Shortly thereafter, Giovannetti was summoned to Justice Pace's office, where he was severely admonished for having raised the issue of bias. Giovannetti explained that he was not concerned about actual bias, but only with the fact that bias may be perceived because of Justice Pace's previous position. Before this Royal Commission, Giovannetti testified that in the course of the conversation Justice Pace said:

Transcript, Page 12476

> A. ... that he knew from the time that poor old Mr. Ebsary was charged that he could not be guilty.

Such a comment reinforced Giovannetti's earlier concern and in our view confirms that the former Attorney General should not have participated in the Marshall Reference.

Responsibility for his sitting on the Reference must rest with then Chief Justice MacKeigan, who assigned judges and who should have been aware of the potential for a perception of bias.

1.12 Donald Marshall, Jr. and the Attorney General's Dept.

We find:

- that Donald Marshall, Jr. was not treated properly by the Attorney General's Department.
- that Gordon Coles should not have attempted to persuade Frank Edwards not to urge the Court of Appeal to acquit Marshall.
- that Edwards is to be commended for refusing to back down in his position in favor of arguing for the Court to acquit Marshall.
- that Edwards acted improperly in arguing before the Court of Appeal that the criminal justice system was not in any way responsible for Marshall's wrongful conviction, a position he knew was not supported by the facts.
- that Coles failed to do any research before advising the Attorney General not to appoint a public inquiry into the Marshall case.
- that Coles' failure to take any positive action to determine why Marshall had been wrongfully convicted is inexcusable.
- that Coles and Martin Herschorn failed to review any of the relevant documents before refusing a *Freedom of Information Act* request for them from Marshall's counsel.
- that Coles' unilateral correspondence with counsel to the Campbell Commission was improper.
- that Coles should have considered whether it was appropriate for the Province to approach the compensation process in the Marshall case simply with an eye to achieving the best possible financial deal for the Province.
- that the Court of Appeal's gratuitous references to Marshall's responsibility for his own conviction were a factor in determining the amount of compensation paid to him.
- that the compensation paid to Donald Marshall, Jr. was only for the period of time Marshall spent in jail.

From the time that the 1982 RCMP reinvestigation was initiated until compensation was finally paid to Donald Marshall, Jr., he or his counsel had frequent contacts with the Department of Attorney General. Mr. Marshall's situation was also the topic of consideration on several occasions by the Department.

Donald Marshall, Jr. was not treated properly by the Attorney General's Department. In many instances, the Department's treatment of Marshall was simply a result of the Department's refusal to deal with the case for what it was - a very special situation. In almost every instance, the architect of this lack of attention and lack of concern was the Deputy Attorney General, Gordon Coles. However, as will become apparent as we review the activities of the Attorney General's Department during this time, there were others in the Department who simply did not pay much attention even when they were asked to do so.

1.12.1 The Reference

In April 1982, Frank Edwards, who had been extensively involved on a regular basis with the RCMP reinvestigation of the Marshall case, wrote a review of the case for his Director (Criminal), Gordon Gale. Edwards concluded that, "Even a complete sceptic would have to agree that had the evidence which is now available been available in November 1971, the jury would have had a reasonable doubt and acquitted." (Exhibit 124, Page 24)

Edwards recommended that the Marshall case be referred to the Court of Appeal for hearing in accordance with Section 617(b) of the *Criminal Code*. He went on:

Exhibit 124, Page 24

> ... I submit that the most desirable result of the reference would be a direction by the Appeal Division that a verdict of acquittal be entered (Section 613(2)(a)) on the basis that there had been a miscarriage of justice. (Section 613(a)(iii))

On January 18, 1983, after the evidence in the Reference had been heard but before the final legal arguments had been heard, Edwards wrote to Martin Herschorn, who at that time was Assistant Director (Criminal). Edwards testified before us that he believed he needed the approval of the Attorney General's Department for the arguments he intended to advance. His letter outlined those arguments.

Exhibit 124, Page 126

> **(a)** The Appellant must bear considerable responsibility for the predicament in which he finds himself. Had he told either the police or his lawyers in 1971 that he and Seale were attempting a robbery, the subsequent investigation and/or defence would have taken different directions. In all likelihood, Marshall would never have been convicted.
> **(b)** The police investigators in 1971 bona fide believed they had the guilty party in the person of Donald Marshall, Jr.; they certainly were not motivated by malice toward either the accused or, as has been suggested in some press reports, prejudice toward his race.
>
> Beyond emphasizing the foregoing, the Crown has virtually no option respecting a position on the ultimate disposition of this case. To verify that proposition, one has only to pose two questions:
>
> First, if the evidence now available had been known in 1971, would Donald Marshall have been charged with Seale's murder? Where all the evidence now available points toward someone other than Marshall, the answer has to be no, Marshall would not have been charged.
>
> Second, if a new trial for Marshall were now to be ordered, who would the Crown call? There does not now exist a single scrap of evidence which points toward Marshall. The Crown would have to offer no evidence at a new trial.
>
> I have considered the possibility of the Crown attempting to take no position re ultimate disposition. I do not believe that such a posture is either tenable or appropriate. The court will want to know the Crown's position and it would be an abrogation of the Crown's responsibility not to take one.
>
> In view of the foregoing, the submission of the undersigned to the court will be that Donald Marshall, Jr. should be acquitted. Where, in my professional opinion, enough evidence exists to charge another individual with Seale's murder, I could not and would not go to court and argue anything else.
>
> I trust I will hear from you on this matter.

Edwards heard very quickly that Gordon Coles wished to see him in Halifax.

The meeting in Halifax included Coles, Gale, Herschorn and Edwards. Even though Edwards' letter raised a number of issues relating to the Crown's submission to the Court, the only issue Coles discussed with Edwards concerned the position Edwards should take with respect to an acquittal.

The Marshall Reference was an extremely unusual situation. The conduct of every aspect of this case should have attracted the attention of the senior staff of the Attorney General's Department. It is simply not acceptable in such a situation that those present at the meeting did not seriously address all the issues raised by Frank

Edwards, including the role of the police and the question of Marshall's responsibility for his predicament.

Coles' only concern was that he did not want Edwards to take the position at the hearing that Marshall should be acquitted. Edwards should take no position at all, Coles said, and simply leave the issue up to the Court to decide. It is incredible that even though Edwards had pointed out in his letter that there was not "a single scrap of evidence" pointing to Marshall's guilt, Deputy Attorney General Coles still did not want Edwards arguing for an acquittal. Coles' explanation that it was an unusual case and that the Court ought to make up its own mind, flies in the face of the role that a prosecutor would normally play, that is, to assist the Court and to give the Court the benefit of the Crown's views as to disposition.

Coles had never appeared before the Court of Appeal in criminal matters and, by his own admission, did not consider he had any expertise in criminal matters. He recognized that his staff - Herschorn and Gale in particular - were the experts in criminal law. However, Coles sought no advice from them in this matter, and they apparently offered none. In his testimony to the Royal Commission, Coles indicated that Gale and Herschorn had agreed with the position he thought Edwards should take. On the other hand, Gale testified that he disagreed with Coles' position, but there is no evidence he made this point at the meeting with Edwards.

We believe that Coles should not have attempted to talk Edwards out of urging an acquittal, and that he should have had the sense to consult with Herschorn and Gale on this issue and with respect to the other issues raised by Frank Edwards in his January correspondence.

This is just one example that senior staff of the Attorney General's Department were simply not paying any attention to the way in which the Donald Marshall, Jr. case was to be presented. We believe this was a dereliction of responsibility on the part of those involved.

The testimony indicates that the discussion between Coles and Edwards at the January meeting became heated at times, with Edwards refusing to go along with Coles' argument that he should take no position. Edwards, in fact, did not back down and - in the face of opposition from his superiors - argued before the Court that Marshall ought to be acquitted. This is in the best tradition of public service by Crown counsel in fulfilling their obligations and is to be commended.

However, in the factum he filed with the Court of Appeal on the Reference on February 4, 1983, Edwards did not simply join with Marshall's counsel in asking the Court to acquit Marshall, or even content himself with pointing out the Crown's contention that Marshall had to accept some responsibility for his "predicament". He went on:

Exhibit 4, Page 40

> It is the Respondent's respectful submission that the role of the Court goes much further in this peculiar situation. Here, if the Court does ultimately decide to acquit the Appellant, it is no overstatement to say that the credibility of our criminal justice system may be called into question by a significant portion of the community. It seems

> reasonable to assume that the public will suspect that there is something wrong with the system if a man can be convicted of a murder he did not commit. A minimum level of public confidence in the criminal justice system must be maintained or it simply will not work.
>
> For the above reasons, it is respectfully submitted that the Court should make it clear that what happened in this case was not the fault of the criminal justice system or anyone in it, including the police, the lawyers, the members of the jury or the Court itself.

When he appeared before the Commission, Edwards was asked about this:

Transcript, Page 12008

Q. Now when you made that submission to the Court, did you believe that?
A. No.
Q. Do you believe it today?
A. No.

In this factum, Edwards went well beyond his honestly held belief - reiterated in his testimony before the Royal Commission - that Donald Marshall, Jr. must accept some measure of responsibility for his wrongful conviction, and took the untenable position that the Court of Appeal should exonerate the system of any blame in the case. As someone who had been intimately involved in the RCMP's reinvestigation of the case - and who had, in fact, urged the RCMP to examine the role played by the Sydney City Police Department in obtaining Marshall's wrongful conviction - Edwards was well aware that the system itself was not blameless.

Edwards testified before us that he had changed his mind about arguing for a miscarriage of justice - the view he had adopted in recommending the Reference in April 1982 - because of his perception of the Court of Appeal's attitude during the taking of the Reference evidence in December 1982. Edwards' testimony on this point is striking:

Transcript, Page 12011

Q. What do you recall about that day?
A. ... When I got to the Court of Appeal to argue the case that day, I was chastised like I have never been in a Court before for not being adversarial enough. Mr. Justice Pace let me know in no uncertain terms that he was not too impressed with my conduct of the Reference. And I mean I don't recall all of that argument, but I'll never forget that exchange because just after I started making my submission to the Court, Mr. Justice Pace interrupted me and he said, "Mr. Edwards, have you ever heard of the adversarial system?" And I said, "Yes my Lord." And he said, "Well, one would never think it. I don't see anything very adversarial about you." He said, "Perhaps you should learn something about the adversarial system." And I started to reply to the effect that surely the adversarial system had some limitation.... He interrupted me there and I think it's a fair description for me to tell you that he was quite emphatic, upset probably wouldn't be overstating it, and he said, "You tell me one, just one of those witnesses that we heard today that we could believe". ....that exchange made me feel, when I reflected on it afterwards, that it's a good thing I did put the argument as strongly as I did. And, you know, I appreciate that this sounds self-serving but I really felt that Mr. Justice Pace was not inclined to acquit Mr. Marshall. And that's just a sense. I'm not impugning anything improper to him but that was his reaction to the evidence and it was a very strong reaction.....
Q. ... You were of the view that if both of you [Aronson and Edwards] advocated to that Court that Marshall should be acquitted on the basis that there had been a

miscarriage of justice, that they would not have gone along with your submissions, is that correct?

A. That was my feeling at the time and after the exchange with Mr. Justice Pace. I just couldn't imagine what I would have heard had I said, "Not only should he be acquitted but you should find that there was miscarriage of justice here. The system failed". I don't think that the Crown pushing for an acquittal in that case would have mattered too much to the Court. I think they just would have ignored me.

Q. That Court would not have found that there was a miscarriage of justice on the facts of this case, is that what you're telling us?

A. And, again, that's ...

Q. That's your impression?

A. That was my impression at the time and I still feel that way.

Edwards believed that even though the Crown and Marshall's counsel were both urging that the appeal be allowed, the Court might well have ordered a new trial unless it was suggested that they could blame Marshall for what had happened to him.

Edwards believed a new trial would put the Attorney General's Department in an untenable position. Because all of the available evidence now pointed to the fact that Ebsary had killed Seale, the Crown would have no evidence to present against Marshall if the Court had simply quashed the original conviction and ordered a new trial. The Crown would have no choice but to stay proceedings. Such an outcome, Edwards believed, would rob Marshall of his chance to be publicly exonerated of the murder of Sandy Seale.

One cannot know whether Edwards was correct in his assessment of the direction in which the Court was headed or whether, on the other hand, his argument exonerating the judicial system convinced the Court to reach the conclusion it did. (It would be a chilling indictment on the way in which justice was administered in this case if Edwards accurately anticipated the need of the Court of Appeal to exonerate the system of justice before it would agree to Marshall's acquittal.) While Edwards' objectives in making an argument he believed was without merit may well have been realistic, the measures he adopted in pursuing those objectives were improper and not in conformity with the responsibilities of his office.

1.12.2 Public inquiry

During the summer and fall of 1983, Felix Cacchione, then counsel for Donald Marshall, Jr., and other concerned citizens asked the Government to consider establishing a public inquiry into the Donald Marshall, Jr. affair.

While there may have been legitimate reasons for refusing to hold a public inquiry at that point - including, most importantly, the need to safeguard Roy Ebsary's right to a fair trial, free from potentially prejudicial publicity - the arguments Deputy Attorney General Gordon Coles raised against an inquiry in an October 1983 memo to Attorney General How demonstrated once again his failure to give the Marshall case the serious attention it warranted.

The memo, in fact, revealed Coles' complete lack of any effort to even check into the correctness of the statements he made to the Attorney General. For instance, Coles stated in his memo:

Exhibit 125, Page 272

> The only police officers who were involved and who are presently available are the present Chief, John MacIntyre, who is due to retire shortly, and Mr. Urquhart, who is now retired.

In his testimony before us, Coles was asked about the basis for this opinion. His answer was startling. Coles testified that he did not investigate at all to see whether or not there were any other police officers who might have had knowledge of the investigation.

Transcript, Page 13889

Q. Is the answer to my question that you hadn't done any investigation to see whether or not there was anybody else involved?
A. I'm sorry the answer is no.
Q. So that the names of Ambrose MacDonald, Richard Walsh, Howard Dean, John Mullowney, Michael Bernard MacDonald, John Butterworth or Ed MacNeil were not names that were ever brought to your attention...
A. No.
Q. ... as police officers who might have had something to say?
A. No.

In his memo, Coles also claimed that because the Crown prosecutor, Donald MacNeil, was now deceased, it would be "almost impossible to thoroughly and properly investigate the way in which the prosecution was handled". He was asked about this:

Transcript, Page 13889

Q. Had you given any consideration before making that statement to interviewing Mr. Matheson?
A. No.
Q. Mr. Khattar?
A. No.
Q. Mr. Rosenblum?
A. No.
Q. Mr. Marshall himself?
A. No.
Q. How can you say then that it would be impossible to thoroughly and fairly investigate the activities of the principals involved in the investigation and prosecution?
A. It was perhaps a little overstatement.
Q. You hadn't done anything, had you, sir, to follow up on whether or not there was anybody other than Mr. MacNeil who might know something?
A. That's correct.
Q. Do you consider that's an appropriate response?
A. Not in hindsight, no.

In the memo, Coles also indicated there was no "ongoing or present police practice which needs to be scrutinized publicly and corrected". But, again, Coles had done nothing to find out whether the Sydney City Police Department was still utilizing the same practices it had used in the Marshall case. He testified:

Transcript, Page 13894

Q. Did you do anything to check and see whether or not that practice [improper questioning of juveniles]... was still being utilized by the Sydney Police Department?

A. No.
Q. So how would you know whether or not there was an ongoing police practice which needs to be scrutinized?
A. Only to the extent that no such other allegations were brought to my attention in respect to other cases.

In the memo, Coles also noted that Marshall had commenced a civil suit against John MacIntyre and the City of Sydney. "Unless a civil suit identifies conduct on behalf of the police officers which would warrant possible disciplinary action," he wrote, "I would continue to be of the opinion that the public interest would not be served by any formal inquiry of the police investigation into this matter in 1971." By opposing any public inquiry, Coles, in effect, was placing the onus on Donald Marshall, Jr. to identify wrongful conduct by those involved in his prosecution.

Given that Donald Marshall, Jr. had been found innocent and had already spent 11 years in jail because of his wrongful conviction, Coles' failure to take any positive action to determine what had gone wrong is inexcusable.

1.12.3 Access to information

The Department's unwillingness to assist Marshall or his counsel continued. In January 1984, Cacchione wrote to Coles, requesting access to any information held by the Department concerning Donald Marshall, Jr. He made the request pursuant to the provincial *Freedom of Information Act*.

Coles did not check to see whether the Department possessed any information. He simply denied Cacchione's request and advised him that there was an appeal to the Attorney General. Coles testified before us that if he had chosen to do so, he could have directed the Department to exercise discretion and release information in the possession of the Department. He simply chose not to take that path.

Cacchione then appealed to the then Attorney General, Ronald Giffin. The Attorney General asked Martin Herschorn to respond to this request and, in fact, directed Herschorn to reject it. Giffin testified that he assumed that the documents had been reviewed by somebody in the Department before Coles denied access to Cacchione.

In his memo to Herschorn, Giffin indicated, "I have not had an opportunity to review the whole file." (Exhibit 125, Pg. 315) Herschorn drafted a letter the next day for signature by the Attorney General to Cacchione in which the Attorney General stated: "I have reviewed Mr. Marshall's request for information." (Exhibit 125, Pg. 316)

Herschorn knew the Attorney General had done no such thing. In fact, nobody in the Department appears to have made any attempt to review any of the documents prior to refusing access to them to Cacchione. The in-house appeal process provided for under the *Freedom of Information Act* - an appeal of the Deputy Minister's decision to the Minister - is inadequate and unworkable. In any event, however, the responsible officials in the Department had a professional responsibility to give Cacchione's request a proper review. Their failure to do so is another example of dereliction of responsibility by senior staff in the Attorney General's Department.

Again, this was, unfortunately, all too typical of the approach officials in the Department took when dealing with the Marshall case.

1.12.4 Compensation

In April 1982, Stephen Aronson, while he was still Marshall's counsel, wrote to the Department of Attorney General and requested that the Department pay the legal fees he had incurred representing Donald Marshall, Jr. Although Coles knew the Department had the discretion to pay the full amount, he directed Aronson to Nova Scotia Legal Aid instead.

Although correspondence continued between Coles and Aronson into 1983, Coles never did consider the account in any context other than as a Legal Aid matter and never recommended the Attorney General consider full payment of Aronson's account.

By the time the Reference hearing was completed, Aronson's account was approximately $80,000. It was eventually paid as part of the compensation settlement.

Shortly after the Reference decision was rendered in May 1983, then Attorney General Harry How asked Coles to "formulate considerations" that ought to be taken into account if Marshall requested compensation. (Exhibit 125, Page 159) Coles asked Martin Herschorn to respond. Herschorn's response commenced as follows:

Exhibit 125, Page 208

> Should a request for compensation be received, it would have to be considered in the light of the comments of the Appeal Division.

Herschorn then went on to quote the comments of the Court of Appeal in which it criticized Donald Marshall, Jr.'s behavior. There is not a word in Herschorn's memo about any other considerations that would be appropriate. No other memos were produced in the Department of Attorney General on the compensation question.

Although Coles testified that Herschorn's memo was not an adequate response to a request to formulate considerations that should be taken into account, Coles himself never followed up this matter to see whether Attorney General How was advised of any other factors that would have been relevant.

In March 1984, the Government of Nova Scotia set up the Campbell Commission. This was a one-person commission headed by Mr. Justice Alex Campbell of the Prince Edward Island Supreme Court. The Commission's mandate was to decide on an amount of compensation to pay Donald Marshall, Jr. Very shortly after the Campbell Commission was constituted, the Government of Nova Scotia, at Campbell's recommendation, made an interim payment of

$25,000 to Marshall.

Cacchione believed the Commission's terms of reference included a review of the police investigation leading to Marshall's prosecution in order to help the Commission decide on what would be an appropriate amount of compensation. He made that point in discussions with Campbell. Gordon Coles, on the other hand, believed the Inquiry should restrict itself only to consideration of how one would arrive at an *ex gratia* payment and should not take into account any considerations of negligence or wrongdoing, nor look at the procedures that led to Marshall being found guilty.

Coles took it upon himself to write to the Campbell Commission counsel on May 8, 1984, setting forth his views of the terms of reference of the Inquiry.

Exhibit 135, Page 411

> ... I have considerable difficulty in understanding how the police investigation would be relevant to the mandate of this Inquiry, particularly since the Commissioner, by his interim recommendation, must be understood to have concluded that Mr. Marshall is entitled to *ex gratia* payments of compensation by reason of his incarceration. As I have stated earlier, the remaining question is the amount and form which the Commissioner recommends it take.

In his letter, Coles went on to suggest that Commission counsel communicate Coles' concerns to the Commissioner:

Exhibit 135, Page 412

> ... Hopefully he [the Commissioner] will agree that everything be put on hold until he gets an opportunity to speak to the Attorney General in respect to these matters.

We believe it was improper for Coles to make any such suggestion to the Commission. The Campbell Commission was supposed to operate independently of the Government of Nova Scotia. If Coles thought the Commission was exceeding its jurisdiction, his recourse was to go to court and ask it to interpret the Commission's mandate. In such a forum, of course, Marshall's counsel would also have been able to make representations on the question. Coles not only did not tell Marshall's counsel about this direct approach to the Commission but he went even further and suggested that Justice Campbell "speak to the Attorney General" before proceeding.

Coles' unilateral communications with the Campbell Commission continued. On May 17, 1984, subsequent to a meeting in Halifax attended by Campbell Commission counsel Hugh MacIntosh, Coles, Felix Cacchione and Reinhold Endres of the Department of Attorney General, Coles wrote again to the Campbell Commission's counsel concerning the scope of the Inquiry.

Exhibit 135, Page 436

> ... In my opinion, the mandate of the Commission ought not to and need not be a matter of uncertainty or debate among us. If there is any doubt or ambiguity as to the purpose intended or scope, to use your terminology, then I suggest the Commissioner should seek clarification and an amendment of the Order if it is thought necessary to make the purpose of the Inquiry more explicit.

We reiterate our earlier comment that this type of private communication to the Commission by Coles was improper.

At the meeting in May 1984 referred to above, Cacchione suggested that rather than holding lengthy and expensive meetings of the Commission, it would be better for the parties to agree on a figure for compensation. Cacchione testified he made this suggestion because he was aware that Coles disputed the right of the Commission to look into the manner in which Marshall's investigation and prosecution had been conducted. He anticipated that if the Commission proceeded and arguments developed concerning the scope of the mandate of the Inquiry, the matter would be in and out of court, and there would be further delays before any money was paid to Marshall. Cacchione testified:

Transcript, Page 11510

> A. ... You've got to appreciate I was coming at this with the background of May '83 through until that date [May 1984] of dealing with this government and this department on that particular issue, and they hadn't budged. They weren't prepared to accommodate us in any fashion and I didn't expect that they would all of a sudden change.

Cacchione was concerned about his client's ability to cope with the pressure if the compensation process became protracted.

Transcript, Page 11512

> A. ... I was also dealing with a client who was, to understate it, in the most fragile state I have ever seen a person before. He was on the verge of cracking. And that is no reflection on him as a human being. But he had just had enough. He was at his wits end. Here was just another example, and I put to him, "Junior, this is what's is going on. We can go with the Commission and run the risk of doing this or we can try and deal with the issue of compensation without the inquiry".

The Government agreed with Cacchione's suggestion that the two sides should attempt to reach a settlement first rather than proceeding directly to the hearing stage. Justice Campbell agreed to await the outcome of the negotiations.

From that point on, Reinhold Endres was in charge of these negotiations on behalf of the Government. Endres described his job in these negotiations during his testimony before the Royal Commission:

Transcript, Page 13112

> A. ... I have no consideration of policy. My purpose was to arrange the settlement at a bottom figure, that is the lowest figure that we could agree upon.

Cacchione, on the other hand, described what he thought his relationship with Endres was, as follows:

Transcript, Page 11526

> A. ... I thought we had reached the point where we were no longer adversaries. That we were, in fact, we had agreed that there should be compensation, and it was just a question of determining the proper figure. I may have been mistaken. Obviously, I probably was.

In retrospect, Cacchione realized that the way in which he conducted the negotiations was perhaps not in Marshall's best interest. He testified before us in referring to the information he provided to the Attorney General's Department at the May meeting:

Transcript, Page 11513

> **A.** I made it quite clear what Mr. Marshall's psychological and financial status was at that particular time. I now know better that in civil negotiations one does not put their bottom line first, and that's what I did, and unfortunately for Mr. Marshall I regret having done that. I should have played hardball. But I was trying to deal with a human being who was cracking and I was hoping that the matter will be dealt with honorably. Unfortunately, in my view ...., it wasn't dealt with in that fashion.

We believe Cacchione was, as he himself admitted, inexperienced in civil litigation and therefore should have sought assistance to ensure his client had the benefit of the best possible advice in these negotiations. On the other hand, Cacchione was dealing with a client who was in a very fragile emotional state and who needed a counsel who would not only represent him but also assist him in coping with his unique and stressful situation. Cacchione's sensitivity to Marshall's needs and his obvious dedication to his client as a human being are highly commendable.

Endres received no directions from his superiors in the Attorney General's Department to treat the Marshall negotiations in any way differently than he would treat a set of negotiations for settlement of any piece of civil litigation. In our view, Coles should have realized that the Donald Marshall, Jr. compensation question was not merely a routine piece of civil litigation and the question of fairness needed to be considered. It was not. Coles testified:

Transcript, Page 13925

> **Q.** Mr. Endres was pretty frank when he was here, I think, in general terms, he indicated that he saw his job in the negotiations was to get the lowest figure he could....
> **A.** I wouldn't disagree with that, as a process of negotiations, no.
> **Q.** And would you have ever given him any instructions to the contrary?
> **A.** No.
> **Q.** Did you give him any instructions concerning the factors that he ought to take into account?
> **A.** Not in the negotiation process, no. I was perfectly confident and relying on that with him.
> **Q.** Were you happy then to, in a sense, turn Mr. Endres loose to negotiate the best deal he could on behalf of the government?
> **A.** Well, negotiate a deal that would be acceptable to the government.
> **Q.** And it wouldn't be, it wouldn't upset you if Mr. Endres was trying to negotiate a settlement the lowest figure that he could?
> **A.** Not at all.

When he testified before us concerning Cabinet discussions, the Honourable Terence Donahoe, a member of the Executive Council, indicated that Cabinet never discussed the case in terms of paying Marshall as little as possible and certainly did not direct that such an approach be taken. Indeed, Donahoe's recollection of the attitude of Cabinet towards the question of compensation was that the Government should:

Transcript, Page 15937

> A. ... simply ... attempt to come to a conclusion that a particular finite amount of money was a reasonable, fair, or equitable financial response to compensate for a very serious loss having been suffered by Mr. Marshall.

In approaching the compensation discussions with a view to getting out as cheaply as possible, Endres used the comments of the Court of Appeal which had branded Donald Marshall, Jr. as largely responsible for his own conviction. Endres indicated that this statement played a role in the course of the negotiations. He testified these comments by the Court had given him a strong basis for argument.

For his part, Cacchione concurred with that assessment.

Transcript, Page 11528

> A. I have absolutely no doubt in my mind that our position would have been much stronger [if the Court had simply acquitted Marshall]. The gratuitous comments stood in the way of these negotiations. It kept coming back. Mr. MacGuigan writes us and lets us know that he's, in fact, the author of his own misfortune. The comment is raised through the Attorney General's Department. It just kept haunting us. Any media coverage would often refer to that. I recall the day that the decision came down from the Appeal Court, a CBC reporter who had been covering the issue, who had sat through the entire Reference hearing, focussed on those pages of the decision, instead of, in my view, focussing on what had occurred and what had transpired throughout that hearing. That, in fact, there were some improprieties that led to his conviction. And it was a hurdle for us to overcome. It was a hurdle with respect to the concerned citizens' group. When we would have to establish or convince them that, yes, those statements were made but here are the facts as we see them, as the RCMP saw them. So there's no question in my mind that it was an obstacle.

Cacchione's reference to "Mr. MacGuigan" refers to a letter Cacchione wrote to the federal Minister of Justice and Attorney General, Mark MacGuigan, in August 1983. In it, Cacchione requested compensation for Donald Marshall, Jr., pursuant to Article 14(6) of the International Covenant on Civil and Political Rights. MacGuigan replied, denying any federal responsibility for compensation to Marshall. He referred to Article 14(6) as well, but to a disqualification in that section to entitlement for compensation. According to Article 14(6), if a newly discovered fact shows that a miscarriage of justice resulted either wholly or partially from the actions of the convicted person, there is no requirement to pay compensation. In referring to this disqualification, MacGuigan quoted extensively from those sections of the decision of the Court of Appeal that placed blame on Donald Marshall, Jr.

As stated elsewhere in this Report, those comments of the Court of Appeal were unfounded and should not have been made. It is obvious to us, however, that these comments did have an effect on the negotiations for compensation. These comments placed Donald Marshall, Jr. in a position of weakness when he should have been in a position of strength. After all, he had just been found innocent.

Cacchione and Endres finally agreed on an amount of compensation - $270,000 - that was slightly less than Endres had been authorized to offer.

Although it had held no hearings, the Campbell Commission was still in existence and it needed to be formally ended. To accomplish this, Gordon Coles - with the concurrence of Cacchione and Endres - drafted a report for signature by Justice Campbell. This report refers to the fact of a settlement having been reached and goes on:

Exhibit 135, Page 530

> Accordingly, I recommend acceptance and implementation of the said agreement in concluding this matter.

Although the report did not explicitly state that Justice Campbell had reviewed the settlement to ensure it was reasonable, this was clearly the impression the document left. Former Attorney General Terence Donahoe, for example, testified he expected Mr. Justice Campbell would have turned his mind to the reasonableness of the compensation paid to Donald Marshall, Jr. He went on:

Transcript, Page 15940

> A. ... I understood, and still understand, that the point of the reference of that negotiated amount for scrutiny by Chief Justice Campbell was to enable him, having the kind of background and experience in capacities which we've talked about - for him to be in a position to offer a reasoned opinion as to whether or not, in his view, that represented a fair or an equitable settlement amount.

A September 26, 1984 press release issued by Attorney General Ronald Giffin announcing the settlement also conveyed the impression that Justice Campbell considered the settlement fair and equitable. The release quotes Attorney General Giffin as saying: "The Government's approval of Mr. Justice Campbell's final recommendation completes the work of the Commission."

In fact, Justice Campbell did not turn his mind to the adequacy of the $270,000. In an interview with the *Halifax Chronicle-Herald* on September 28, 1984, Justice Campbell "said he merely approved the amount of compensation agreed to by the parties in the dispute". Cacchione himself testified that Justice Campbell called him, and that Cacchione had indicated to the Commissioner that the $270,000 figure was one he and Endres had agreed on. But he told us he does not recollect indicating to Campbell that he felt the figure was satisfactory. Campbell himself was not asked to appear as a witness at this Royal Commission.

Gordon Coles' drafting of Justice Campbell's report, coupled with the wording of the Province's own press release, however, clearly conveyed the impression that Campbell was "recommending" the amount rather than merely accepting it.

The Government viewed the $270,000 as compensation for the period of time Donald Marshall, Jr. spent in jail. It did not take into consideration any negligence or wrongdoing that may have put him there or kept him there. Notwithstanding that, Marshall was asked to - and did - sign a full release of any and all claims which he might have had against the Crown. The monies paid to Donald Marshall, Jr. do not in any way purport to compensate him for the inadequate, incompetent and unprofessional investigations of Sandy Seale's murder by John MacIntyre and the Sydney City Police Department; the inadequate representation he received at the hands of his counsel; the failure of the Crown prosecutor to disclose the inconsistent statements of key witnesses; the failure of the Attorney General's

Department to disclose their knowledge of Jimmy MacNeil's coming forward in November 1971; and the incompetent reinvestigation by RCMP Inspector Marshall in November 1971 - none of which relates to the period Marshall spent in jail.

There was no evidence before us to enable this Commission to assess the fairness and reasonableness of the compensation agreed to. But we do know that, out of the $270,000 paid, Marshall was required to pay his legal fees, including both Aronson's account of about $80,000 and Cacchione's account of about $20,000. We believe that, unless there are extenuating circumstances, a person who has been found to have been wrongfully convicted should not be expected to pay for the legal expertise necessary to get him out of jail. Nor, absent extenuating circumstances, should that person have to pay the legal fees incurred in getting compensation.

The Commission did hear extensive evidence on the process by which compensation was eventually granted. Despite the intention of the Ministers involved, the process was not fair. Marshall's emotional state following 11 years in prison was such that he simply wanted to get the matter over with. It is our view that the final outcome was most significantly influenced by the findings and comments of the Court of Appeal in the Reference. The conclusion that Marshall was involved in a robbery and the opinion that Marshall had "contributed in large measure to his conviction" provided the Crown with a strong basis for keeping any compensation as low as possible. We have concluded that there was no robbery, and that there was a gross miscarriage of justice which can in no way be blamed on Marshall. We do not know if the compensation negotiations would have reached a different result had the facts as we have found them been available to those concerned.

Notwithstanding the release by Marshall, we believe it would be most unjust should that settlement be allowed to stand without any further consideration of its fairness based on the facts as now known. Accordingly, we recommend that Government recanvass the adequacy of the compensation paid to Donald Marshall, Jr. in light of what we have found to be the factors contributing to his wrongful conviction and continued incarceration.

1.12.5 Appointment of this Royal Commission

Despite the resolution of the compensation issue, controversy over the handling of the Marshall case continued and there was even more pressure for the Government to appoint an inquiry to examine all aspects of the case. The Attorney General insisted that the Government could not set up such a Commission until Roy Ebsary had been finally dealt with by the courts.

Ebsary had been charged in connection with Seale's death in 1983, but he was not finally convicted until 1985, after three trials. He was sentenced to three years in prison, but Ebsary's counsel appealed and on May 6, 1986, the Court of Appeal reduced his sentence to one year. On September 29, the Supreme Court of Canada turned down an application by Ebsary's counsel for leave to appeal his conviction and sentence.

Less than a month later, on October 28, 1986, the Government announced the appointment of this Royal Commission.

Part 2
Recommendations

2.1
Righting the Wrong: Dealing with the Wrongfully Convicted

No criminal justice system is, or can be, perfect. Nevertheless, the manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured.

Justice
Report on Miscarriages of Justice (1989)
The British Section of the International Commission of Jurists

We intend to make comments and recommendations about broad public policy issues involved in the administration of justice and in the day-to-day operations of police forces, but we would be remiss if we did not also address a much narrower and more specific, but no less troubling issue - wrongful conviction.

How should society deal with situations like the one involving Donald Marshall, Jr., in which people are convicted and jailed for crimes they did not commit? First of all, how do we make sure we find out about situations in which someone has been wrongly convicted, and second, how do we determine a fair method to compensate those who have been wrongly convicted?

In this section of the Report, we will deal with these issues separately and draw on the evidence we heard concerning the Marshall case as a starting point for the recommendations we will make.

2.1.1 Finding and releasing the wrongfully convicted

The Marshall case is not unique, and it would be unrealistic to assume otherwise. "Justice", the British Section of the International Commission of Jurists, for example, estimates there are at least 15 cases a year in the United Kingdom in which people are imprisoned for crimes they did not commit. One such incident, of course, is clearly too many, so the question for us is how do we bring these situations to light and provide wrongly convicted people with a fair opportunity to establish their innocence.

We believe someone - or some body - has to be appointed to serve as a kind of "court" of last resort, not only for individuals who claim they have been wrongfully convicted but also for others who may have information that someone else has been wrongly convicted.

2.1.2 The Marshall case

Consider the number of people associated with the Donald Marshall, Jr. case who had information that - if it had reached the right ears - might have uncovered Marshall's wrongful conviction much earlier.

John Pratico, Maynard Chant and Patricia Harriss knew they had lied at Marshall's 1971 trial. Pratico's mother knew her son did not see the murder because he asked her the morning after the stabbing what had happened in the park. Chant told both his mother and his minister what had happened. Sandra Cotie, Barbara Floyd and Joan Clemens all knew Pratico lied at trial. Donna Ebsary had seen her father wash blood from a knife on the night Seale was murdered, and later told a friend, David Ratchford, about what she had seen. Jimmy MacNeil, of course, witnessed Roy Ebsary stab Sandy Seale.

For every case where a person is wrongly convicted, there may be Barbara Floyds, Donna Ebsarys and David Ratchfords. Where can they go with this information and be certain their information will be seriously considered and investigated?

There is evidence in the Marshall case that at least some of these people did attempt to bring their information to the attention of those they considered proper authorities. Barbara Floyd and her friends did telephone Marshall's counsel to tell him what they knew but were told it was too late. After that, Floyd testified, "We didn't know what else to do." Donna Ebsary and David Ratchford took their information to Gary Green, an RCMP officer they knew. Green, in turn, directed them to the Sydney City Police Department. When the local police refused to reopen the case, Green not only went to discuss it with officers in the department himself, but he also passed the information on to the RCMP's General Investigation Section in Sydney. He testified he was given the impression the investigation was closed, and he did nothing further.

Jimmy MacNeil also took his information to the Sydney City Police Department following Marshall's conviction in 1971. Although the matter was turned over to the RCMP and a reinvestigation was conducted, we have already concluded that this investigation was handled in a shockingly inept manner. Inspector Marshall, who conducted the investigation, was frank with us in admitting that he accepted without hesitation the interpretation of the original investigating officer MacIntyre.

Given what we have learned about the way in which various police forces handled information brought to them in the Marshall case, we would be hard pressed to argue that people should - or would want to - take such information to a police force.

Similarly, given what we now know about the tactics used by the Sydney City Police to obtain false statements from witnesses in the Marshall case, one could not reasonably have expected Pratico, Chant or Harriss to then go back to the same Sydney City Police Department after the trial and tell them that they had lied in their statements. Nor, given their experience with one police force, could they be expected willingly to approach another with their information.

Although it is important to note that the RCMP's 1982 investigation did lead to Marshall being freed from prison - implying that one cannot always assume that a police force will not be able or willing to conduct a proper investigation into allegations of wrongful conviction - we believe most citizens would feel more comfortable taking this sort of information, at least initially, to a person or body they do not consider to be part of the criminal justice system, or directly or indirectly involved in the original investigation. We believe it makes more sense to expect citizens to provide information to a body that would not seem to have any sort of vested interest.

In order for such an independent body to function effectively, people must not only know about that body's existence and role, but also have confidence that such a body has the power and the resources to conduct a thorough reinvestigation of the conviction.

There are two issues here. The first is the constitution of a reinvestigative body and the second is the nature of its powers.

Recommendation 1

We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism - an individual or a body - to facilitate the reinvestigation of alleged cases of wrongful conviction.

Recommendation 2

We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.

It is our view that this review body would have a jurisdiction and responsibility that includes both the "administration of justice" (Section 92(14) of the *Constitution Act, 1867*), and substantive "criminal law and procedure" (Section 91(27)). It would be a national body, formed on a cooperative basis by the Federal and all the Provincial Governments, and would report jointly to both the federal Minister of Justice and the relevant provincial Attorney General.

Based on the findings and recommendations of the review body, the federal Minister of Justice may choose to invoke the powers of either Sections 690 and 749 (formerly 617 and 683) of the *Criminal Code*, or alternatively, take no action at all. In cases where the review body recommends that the Minister invoke his powers pursuant to these sections of the *Criminal Code* and the Minister chooses not to do so, the federal Minister should be required to publicly state the reasons for such decision. Corrective action may also be taken at the provincial level, where necessary.

We are not attempting to create another layer of bureaucracy. For the time being, all that may be necessary is for one person to be given the powers referred to above. It may not even be necessary for this responsibility to occupy that person full time. He or she may call upon police expertise to assist in or to carry out the necessary investigative work.

What is necessary is that steps be taken immediately to set up such a review facility and that Canadians be made aware that this review facility exists. It will not help wrongfully convicted persons if people do not know its services are available. Steps must be taken to ensure extensive and continuing publicity.

2.1.3 The methodology for compensation

When a convicted person is found to have been innocent and seeks compensation for his or her wrongful imprisonment, those in authority must respond not only fairly and compassionately, but also quickly.

During the course of our hearings, the Federal-Provincial Task Force Report on Compensation of Wrongfully Convicted and Imprisoned Persons and the Federal-Provincial Guidelines relating to such compensation were placed in evidence. (A copy of the Guidelines is attached as Appendix 14.) In March 1988, at a meeting in Saskatoon of federal and provincial Justice Ministers, those Guidelines were accepted. In addition, the Federal Government announced it would pay 50 percent of the cost of compensation awarded in accordance with these Guidelines to those who were wrongfully convicted.

We have considered all of this information in coming to our own recommendations.

Recommendation 3

We recommend that when a person is found to have been wrongfully convicted, a judicial inquiry be constituted to consider any claim for compensation. The person or persons appointed to this inquiry should be completely independent of any involvement with the administration of justice in the province which gave rise to the wrongful conviction.

We do not believe a Court of Appeal should deal with claims for compensation arising from a wrongful conviction because it may have already determined the innocence of the wrongly convicted person. A Court of Appeal does not customarily hear *viva voce* evidence, and the amount of time which it would take to properly present a full case for compensation would inevitably take up a substantial portion of the time of a Court of Appeal.

Recommendation 4

We recommend that there be no pre-set limit on the amounts recoverable with respect to any particular claim or any particular aspect of a claim.

Although the Federal-Provincial Guidelines prescribe the considerations to be taken into account in determining total compensation and set a limit for non-pecuniary loss at $100,000, we echo the admonition contained in the 1980 report of the New Zealand Royal Commission to Inquire into and Report upon the Wrongful Conviction of Arthur Allan Thomas for the Murder of David Harvey Crewe and Jeanette Lenore Crewe. "Common decency and the conscience of society at large," the Inquiry commented, "demand that Mr. Thomas be generously compensated."

Recommendation 5

We recommend that any judicial inquiry be entitled to consider any and all factors which may have given rise to the wrongful conviction, imprisonment or the continuation of that imprisonment.

Recommendation 6

We recommend that appropriate legal fees and disbursements incurred by or on behalf of the wrongfully convicted person be paid as part of the inquiry's expenses.

Recommendation 7

We recommend that the inquiry report become a public document.

We hope there are not many other cases in Canada in which persons have been - or will be - wrongfully convicted; however, there are bound to be some such cases. We believe that these recommendations for an independent reinvestigative review mechanism and the prompt setting up of a judicial inquiry to determine fair compensation for the wrongfully convicted will go a long way in assisting those who may have suffered the horror of being imprisoned for a crime they did not commit. We can say, based on our experience in this case, that such people must be provided with a full opportunity to prove their innocence and must be compensated fairly and expeditiously by Government.

We wrote in Part 1 that Donald Marshall, Jr. was not treated fairly when he sought compensation for his wrongful conviction and imprisonment. We also found that the compensation paid to him was undoubtedly influenced by the finding of the Court of Appeal that he was involved in a robbery and by the Court's comment that any miscarriage of justice was "more apparent than real". This view was reinforced by the majority judgment of Madame Justice McLachlin of the Supreme Court of Canada in that Court's October 5, 1989 decision respecting the Commission's request to question members of the Nova Scotia Court of Appeal. After referring to the decision of the Nova Scotia Court of Appeal, Madame Justice McLachlin states, "The comments of the Court of Appeal had an impact on the quantum of that payment [the compensation]."

It was in the context of the decision of the Nova Scotia Court of Appeal that counsel on behalf of Marshall negotiated a settlement and Marshall executed a full release. We heard no evidence on the adequacy of the amount actually paid, and accordingly express no opinion on it. However, it is our view that, in light of the facts as we have found them, the compensation process was so seriously flawed as to require a careful reconsideration of the adequacy of the amount paid.

Recommendation 8

We recommend that Government recanvass the adequacy of the compensation paid to Marshall in light of what we have found to be factors contributing to his wrongful conviction and continued incarceration.

2.2
Visible Minorities and the Criminal Justice System

Marshall is the typical Indian lad that seems to lose control of his senses while indulging in intoxicating liquors. Apparently he enjoys a good fight while intoxicated.

Corrections Canada Admission Document
concerning Donald Marshall, Jr.
July 21, 1972
Exhibit 112, Page 3

One reason Donald Marshall, Jr. was convicted of and spent 11 years in jail for a murder he did not commit is because Marshall is an Indian. The statement quoted above is simply one of the more blatant and overt examples of the seemingly unconscious racism and racial stereotyping that influenced what happened to Donald Marshall, Jr.

That racism played a role in Marshall's conviction and imprisonment is one of the most difficult and disturbing findings this Royal Commission has made. But reaching that conclusion was only the first part of our duty as Commissioners. We also had to determine whether such a tragic and unacceptable incident could occur again today and, if it could, to make recommendations to make sure it does not.

Much has changed - and improved - in Nova Scotia in the 18 years since Donald Marshall, Jr. was convicted of murdering Sandy Seale. But as recent events such as the highly publicized incidents involving fights between Black and White students at a high school in Cole Harbour make clear, one should never automatically assume that racism and discrimination occurred only in the past.

If a Native - or a Black person - were charged with a similar offence today, what effect might their racial origin have on how their case would be handled by the police, by Crown and defence counsel, by the courts, and/or by the corrections system? If a Native or a Black were wrongfully convicted of a crime and later discovered to be innocent, what effect, if any, would race have on the amount of compensation he or she receives? What positive measures can this Royal Commission recommend to ensure that our justice system will not - and cannot - be influenced by the color of a person's skin?

We realized from the beginning of our work that the bald facts of the Marshall case - a Native youth, who is charged with murdering a Black youth, is investigated, tried and convicted by a criminal justice system that is made up only of Whites - could not help but raise questions about the role the race of the accused and/or the victim may have played in the handling and disposition of this particular case.

To help us deal with the specific issues associated with the Marshall case, we granted full standing to both the Union of Nova Scotia Indians and the Black United Front to allow them to appear before the Commission and to question witnesses during our public hearings. Their input was of considerable assistance to us in reaching our conclusions about the Marshall case.

We also realized that, regardless of the outcome of our deliberations on the Marshall case, we would have to examine how Natives and Blacks are treated in the criminal justice system in Nova Scotia today in order to determine whether what happened to Seale and Marshall could also happen to two teenagers in a similar situation in 1990.

Recognizing that the public hearing process was not a suitable forum for a discussion and analysis of complex issues of discrimination and racism, the Commission launched a parallel research program, which included commissioning independent scholars and researchers to take an analytical look at whether - or to what extent - race is a factor in the criminal justice system in Nova Scotia. Two of the five research reports deal specifically with issues facing Natives and Blacks (Volume 3: "The Mi'kmaq and Criminal Justice in Nova Scotia" and Volume 4: "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System").

The Commission also convened a Consultative Conference in November 1988, to which we invited experts from across North America. Over the course of two-and-a-half days, they provided us with a broader perspective on the issues of discrimination and racism in the criminal justice system, and helped us to focus our own thinking on possible approaches to dealing with these issues. (See Volume 7 for an edited transcript of this Conference.)

What did we learn from this process of research and consultation?

Although there may be some legitimate and important differences of opinion about precise numbers (see Appendix 18 to Volume 2 of our study, "Public Policing in Nova Scotia"), it is sufficient for our purposes here to point out that the Native and Black population in Nova Scotia is relatively small. The 1986 census figures indicate that out of a total population of 873,176, there are 4,610 Natives on-reserve and 9,615 off-reserve, and 12,945 Blacks.

As a group, those Natives and Blacks are poorer, less educated, more dependent on social assistance, more likely to be unemployed and, when employed, more likely to work in low-paying, menial jobs than their White counterparts. We learned that Blacks and Natives are disproportionately represented in our penitentiaries and prisons, but almost totally absent from the public life of the province.

Witnesses at our public hearings, experts at our Consultative Conference, and the researchers who authored our commissioned studies all made the point that - regardless of intention - racial origin is a factor in this second-class status that minority group members endure in Nova Scotia - in other words, Natives and Blacks are disadvantaged because they are Native and Black. Racism, we were told, is alive and well in Canada, and specifically in Nova Scotia. As Dr. Wilson Head, one of the authors of the research study which appears as Volume 4, put it at the Consultative Conference:

Volume 7, Page 49

> Is there a different law for the poor and for the rich? For the minorities and the rich? Most minority groups are poor. They get it in the neck because they are poor. They get it in the neck because they are young. They get it in the neck because they are uneducated. They get it in the neck because they are racial minorities.

What does all of that have to do with the criminal justice system and the duty of this Royal Commission to bring forth recommendations to make sure another Marshall case will not happen in the future?

We recognize that the root cause of much of the discrimination Blacks and Natives complain about can be traced to social, political and economic structures, institutions and values that are not specifically part of the criminal justice system. We also recognize that we do not have the mandate - or the expertise - to make recommendations concerning public education or housing or social services or other matters that lie outside the criminal justice system. Nonetheless, we believe it is important to point out that the criminal justice system is simply one part of the broader social order, and that it will be impossible to solve all the problems we have identified within the justice system without also addressing broader issues such as equal access to education.

While the education system *per se* is not within the terms of our mandate, for example, it is clear that without access to a university education, Blacks and Natives cannot participate in the criminal justice system as lawyers, para-professionals and judges.

There are encouraging signs that access is improving. Dalhousie, Nova Scotia's largest university, is attempting to make it easier for Blacks and Natives to take advantage of post-secondary education options. The university's "Transition Year Program" has been providing educational and other support for Black and Native students, who might not otherwise be able to attend university, since 1969. The Micmac Professional Careers Project at Dalhousie University's Henson College and the Micmac Social Work Program at the Maritime School of Social Work are providing assistance and encouragement to Micmacs who wish to pursue certain professional paths. In addition, a 1989 report by the Dalhousie University Task Force on Access for Black and Native People has made recommendations to deal with a variety of problems facing visible minority students at Dalhousie. Finally - and particularly relevant to the work of this Royal Commission - the University launched a new program in September 1989 to encourage indigenous Black and Micmac students to attend Dalhousie Law School.

These developments at Dalhousie, while largely outside our mandate, are significant and we believe will be helpful in changing or eliminating the perception of Blacks and Natives that the criminal justice system is closed to them.

At the moment, Blacks and Natives clearly do feel aggrieved by their treatment at all levels of the justice system: by police, Crown prosecutors, defence lawyers, government officials and judges. Blacks and Natives believe that those working in the system - from top to bottom - lack sensitivity in dealing with members of visible minority groups. They believe they have no stake in what they regard as the "White man's justice system".

Not only does that system not reflect the needs of their people, Black and Native leaders told us, but it also does not even reflect the simple fact of the *existence* of their people. The number of Natives and Blacks who are police officers, prosecutors, defence lawyers, judges and court workers, for example, is disproportionately and unjustifiably low, while the number of Natives and Blacks who are accused persons is disproportionately high.

None of this is to suggest that this is the result of any evil intention to discriminate by those in the criminal justice system. But the Supreme Court of Canada itself has recently ruled that it is no longer necessary to prove that someone or some body intended to discriminate in order to find that that person or institution did discriminate. (See *Ontario Human Rights Commission* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536) The highest court has also considered the notion of what is called systemic or "adverse effects" discrimination. Systemic discrimination is what happens when a specific act, policy or structural factor - intended or unintended - results in adverse effects for members of certain specific groups.

Although much of the discrimination that occurs in the criminal justice system is of an unintended sort, it is no less insidious and its impact is no less devastating because of that. What can be done to eliminate this systemic discrimination and to give Blacks and Natives faith that the criminal justice system will treat them fairly?

Before we attempt to answer those questions, it is important to make the point that although there are clearly some common interests between Blacks and Natives, these two minority groups do not regard the criminal justice system in exactly the same way. Historical, cultural and constitutional factors have placed Natives in a special position in Canada. Without wishing to oversimplify, we can say that Native groups generally want a greater measure of control of their own judicial affairs while Black groups generally want a stronger voice in the existing system. Because of these important cultural and historical differences, we will deal with the specific concerns of Natives and Blacks in the criminal justice system in separate sections of this Chapter.

To begin, however, we will consider some issues of common concern to both Natives and Blacks. These include the need for governments at all levels to devise firm anti-racism policies; training that would lead to better representation of visible minorities in the criminal justice and legal system; improved access to useful legal information for Blacks and Natives; and more inventive options in sentencing of members of visible minorities.

Our challenge is to propose solutions that will attack these problems in a way that will not only improve the lot of visible minorities in this province but also establish a model that can have an impact even beyond the boundaries of Nova Scotia. Some of our suggested solutions will require the cooperation of the Federal Government, which has jurisdiction over several of the matters before us. We believe this is a unique opportunity for Federal and Provincial Governments to work together towards constructive change.

2.2.1 Representation of Natives and Blacks

> A tension exists in Canadian society between the original European partners in Confederation who dominate Canadian institutions and the other people who wish to share fully in the institutional life of the country. Inherent in the notion of diversity of Canadian society as a 'mosaic' is the equal participation of the pieces making it up.

Equality Now
House of Commons Special Committee on the Participation of Visible Minorities in Canadian Society (1984)

Natives and Blacks are still almost invisible in the institutions operated by the majority White society in Nova Scotia, including the criminal justice system. It is time the complexions of those institutions changed.

That is not to suggest that merely increasing the proportional representation of Natives and Blacks will suddenly solve all our racial problems. Increasing the quality of representation - getting minority group members into senior positions - will be just as important. However, this will only ultimately make a difference if the system itself changes to meet the needs of the minority communities.

With those caveats on the record, however, we still believe increasing the number of Blacks and Natives in the criminal justice system is a necessary and overdue first step in making the system more responsive to and representative of visible minorities.

In addition, the presence of more non-White faces in these important and respected institutions will be of value not only to minority group members. It may also help the general population develop increased sensitivity to - and tolerance for - the needs and aspirations of visible minorities. Their presence will remind us on a daily basis that minorities are members of our society too, and that that society is not - and never has been - completely White.

2.2.2 Anti-racism policies

> Racism exists as a demonstrable social factor in social relations in Canada and the justice system is not excepted... A resolute political will must be adopted to acknowledge up front the existence of racism and to set about eliminating it by moving it onto the public policy agenda. Policymakers, legislators and government have an extra responsibility to create a climate which will be more inhospitable for racism.

Esmeralda Thornhill
Consultative Conference Proceedings
Volume 7, Page 72

Our mandate extends to a complete examination of the criminal justice system in Nova Scotia, its administration and the manner in which criminal justice is delivered. The recommendations which follow focus on the criminal justice system but we realize that our recommendations, if implemented, may have wide-ranging effects in other areas of Canadian society and government as well.

The first step must be for the Province of Nova Scotia to make sure its own house is in order so it can provide leadership for private and other public sector policy-makers and decision-makers. Our recommendations concerning the establishment of clear anti-racism policies within the Provincial Government include specific components dealing with improving the number and the quality of visible minority representation in the Departments of Attorney General and Solicitor General, as well as establishing a mechanism to monitor and enforce this employment equity provision.

Monitoring and enforcement will be vital because unless such mechanisms are in place, there will be no way to evaluate the effectiveness of affirmative action programs or to make certain that those responsible live up to the goals of the programs.

Recommendation 9

We recommend that the Departments of the Attorney General and Solicitor General adopt and publicize a Policy on Race Relations that has as its basis a commitment to employment equity and the elimination of inequalities, based on race, in these Departments and their agencies and the reduction of racial tensions between these Departments and the communities with which they interact.

This policy statement should include goals and timetables for recruitment and hiring to achieve employment equity for visible minority groups. By having more minority group members on staff, these departments, which deliver and administer criminal justice, will gain a better understanding of the needs and views of the visible minority groups with which they are in day-to-day contact. They must also not only make a real effort to increase the hiring of visible minorities but must also work to sensitize all their staff to racial problems.

Mechanisms do not now exist in Nova Scotia to monitor and enforce a policy such as we are recommending. The 1987 Annual Report of the Nova Scotia Civil Service Commission, for example, shows that of a total of 10,123 provincial civil servants, 208 are Black, seven are Native. But what does that really mean? Such numbers tell us nothing about the quality of representation of Black and Natives within the Province's public service because there is no monitoring mechanism built into that system to ensure that it is achieving its goals.

We believe the Human Rights Commission is the most effective body to fulfill this critically important role. But we recognize that in order to be effective, the Commission must have adequate resources and be independent of Government.

The concerns of Natives and Blacks must not only be part of the agenda of the Attorney General and Solicitor General's Departments but must also be integrated into general Government policy. Regular meetings between visible minority group representatives and key Government officials will provide opportunities for dialogue and understanding in a non-confrontational, non-crisis atmosphere.

Recommendation 10

We recommend that a Cabinet Committee on Race Relations be established which would include the Attorney General and Solicitor General. This Committee should meet regularly with representatives of visible minority groups in order to assure the input of these groups in matters of criminal justice.

2.2.3 Legal profession

Visible minorities in the legal profession fare no better than in Government. There are currently almost 1,200 lawyers in Nova Scotia who are eligible to appear before the courts. Of these, about a dozen are Black. There are no Micmac lawyers in Nova Scotia. To our knowledge, only one Native has ever graduated from Dalhousie Law School. There is one Black judge in Nova Scotia, at the Family Court level, and no Micmac judges.

It is obvious that visible minorities cannot be represented among the ranks of Crown prosecutors, defence counsel and the judiciary unless they are entering and graduating from law schools in greatly increased numbers, and they cannot do that without a solid educational foundation. Improvements are needed in the education system to ensure that minority students are given support, both educational and financial, to put them on an equal footing with White students.

The Dalhousie Law School's recently announced minority admission program - which includes special recruitment efforts and a summer program as well as educational and financial support - would appear to include all of the elements we have identified as being necessary to a successful initiative, and we are encouraged by its establishment. But Dalhousie's leadership must be accompanied by the financial support of governments and the bar in order to ensure that the increased participation of visible minorities in the legal profession actually occurs.

Recommendation 11

We recommend that the Dalhousie Law School's minority admissions program for Micmacs and indigenous Blacks receive the financial support of the Governments of Canada and Nova Scotia, and the Nova Scotia Bar.

In order for such programs to achieve the desired end, of course, it will be essential for those in authority to then take advantage of this growing pool of lawyers from the visible minority communities when making appointments.

Recommendation 12

We recommend that Governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members whenever possible.

Although these recommendations promote diversity in the legal profession and the courts, it is clear the legal profession and the courts are still almost entirely - and will continue to be largely - White institutions. Our research shows that many Natives and Blacks feel poorly served by the legal profession, not only because there are so few visible minority lawyers, but also because many lawyers seem ill-equipped to deal with the special problems of minority clients. The profession has a responsibility not only to encourage racial diversity in its ranks but also to assist in sensitizing its members to minority issues. In order to make sure that those who are part of the system have an awareness of and sensitivity to issues facing Natives and Blacks, education and ongoing training will be necessary.

Recommendation 13

We recommend that the Dalhousie Law School, the Nova Scotia Barristers Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.

Law schools provide lawyers with their basic legal education, emphasizing legal concepts, skills training, and "thinking like a lawyer". Most students graduate from law school with little exposure to the daily reality of the minority population. While Dalhousie Law School now offers a course in Native Law, this is only available to a few students. In addition to such specific courses, the Law School must encourage law students to consider minority concerns in all their courses. This must be done not only in relation to substantive legal issues, but also in terms of sensitizing our future lawyers to the particular needs of visible minorities.

Once they graduate from law school, lawyers' continuing education is dealt with first through the Bar Admission Course and then through the Continuing Legal Education Society of Nova Scotia. To date, there has been little or no emphasis in these courses and programs on minority issues, and we urge those who run them to make this a priority. With so few minority lawyers in the province, all of the practicing bar must accept some responsibility to become attuned to these issues.

Crown prosecutors have a special role in ensuring that the system is perceived to be dealing with individuals on an equal footing, regardless of race. It is therefore important that continuing professional education programs include sessions which introduce Crown prosecutors to the facts of systemic discrimination.

Recommendation 14

We recommend that the Attorney General establish continuing professional education programs for Crown prosecutors, which would include:

(a) *an exposure to materials explaining the nature of systemic discrimination toward Black and Native peoples in Nova Scotia in the criminal justice system; and*

(b) *an exploration of means by which Crown prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotia criminal justice system.*

Judges must be fair and impartial in dealing with all who appear before them. They must also appear to be fair and impartial. Our research, as well as anecdotal reports, indicate that some individuals from visible minority groups believe that some judges treat them with less respect than White accused. We cannot comment on whether these perceptions are based on fact, but these perceptions do exist and that causes us concern. A fair judiciary is the cornerstone of our legal system. One incident of unfairness on racial grounds holds the entire judiciary open to disrespect.

The role of judicial councils in disciplining judges for improper conduct is not widely known. The judicial councils, which provide the only mechanism through which a citizen can complain about a judge's conduct, should publicize their existence and functions. The public must be able to see that judges are subject to the same, if not higher, standards of behavior as other participants in society.

2.2.4 Police

Police/minority relations are a very important part of the work of this Royal Commission. The Chapter on Policing (Chapter 2.6) discusses the organization, training and services provided by the police, as well as their particular responsibilities in dealing with visible minorities.

We heard allegations in our public hearings about tensions between the Native youth of the Membertou Reserve and the Sydney City Police Department in the early 1970s. For example, Native witnesses have suggested that Native youth were picked out as troublemakers, hassled without cause, occasionally roughed up and regularly kicked out of Wentworth Park, their favorite meeting place. We have evidence from non-Native witnesses who dated Indian boys that the police told their parents they should not hang around with Indians. We also heard that members of the Sydney City Police Department in 1971 received little or no training of any kind, and no training at all in dealing with Native people or other visible minorities. Even now, there is little education of police officers in Sydney - or elsewhere in the province - on the special needs of visible minorities.

Recommendation 15

We recommend that training for all police officers, both at the intake level and as continuing education, include content on police/minority concerns and sensitivity to visible minority issues.

We understand there is such a course on the books at the Atlantic Police Academy, but that it is inactive because of low enrollment. This is simply not good enough.

Many Natives and Blacks believe police officers accept negative stereotypes of members of minority groups. Our researcher was told, for example, that many Natives believe police might respond slowly to an incident on a reserve because the police believe that most such incidents are alcohol-related and will resolve themselves if left alone.

A recent study done by Dr. Joseph Fletcher *et al.* at the Centre of Criminology at the University of Toronto confirms that police officers are prone to racial stereotyping of Natives and other visible minorities. While police may stereotype Natives as a group, the study indicates they are less likely to believe Native people as a group have unique rights that must be recognized. They do not favor programs such as affirmative action to give Native people help in "catching up". According to the study, police officers generally believe individuals control their own personal fate. Consequently, if a particular group fares less well in the social or economic order, police officers believe the problem is simply that they have not tried hard enough.

With a continuing lack of training to help them understand the reality of systemic discrimination - and with younger police officers frequently forming their values and methods of operation from more experienced officers - it is not surprising that these attitudes can become self-perpetuating.

It is essential that those responsible for police recruitment and training, whether at the municipal level or the RCMP, recognize not only that those with racial biases should not be permitted to engage in police work, but that recruits as well as veteran officers must be provided with ongoing training in police/minority issues.

2.2.5 Legal information needs of Natives and Blacks

We have heard from many sources that Native and Black communities have little access to information about the law and little knowledge about how the justice system operates. Having an educated and sensitive bar can help, but more is needed.

In Nova Scotia, as in most other provinces, the Public Legal Education Society provides information about the law to the public. This organization has great potential for providing programs specific to the needs of minorities. However, experience has shown that unless this information is geared towards the minority group and produced in cooperation with them, it will probably not be effective. Such organizations must be aware of and sensitive to the needs of the communities to which their material and programming is directed and must work with these communities to fill their legal information needs.

Recommendation 16

We recommend that the Public Legal Education Society consult and work with Native and Black groups to develop and provide legal materials and services for minority users. These initiatives cannot be undertaken without specific funding. This should be provided where necessary by Government.

2.2.6 Sentencing options

Both of our minority-related research projects, as well as a recent Nova Scotia court decision (See *R.* v. *Hebb* (1989), 89 N.S.R.(2d) 137), point out that the lack of a fine options program creates special problems for the poor in Nova Scotia. This has particular relevance for Blacks and Natives because so many of them are poor. Fine option programs provide judges with options other than imprisonment for those who cannot pay court-ordered penalties.

The Nova Scotia Government brought forward legislation in the spring of 1989 to permit the establishment of such a fine options program here. We hope the Government quickly proclaims this legislation and that the regulations under the legislation will take into account the special needs of Natives and Blacks.

Recommendation 17

We recommend that the Government immediately proclaim the Alternative Penalty Act, *S.N.S. 1989, c.2, and that regulations which address the particular needs of Native and Black offenders be enacted.*

Diversion programs are another alternative to sending people to jail. If a goal of the criminal justice system is to prevent crime and permit meaningful rehabilitation of the offender rather than simply to impose routine and unthinking incarceration, diversion of alleged offenders away from the system must be explored.

Police and prosecutors now have enormous discretion to "criminalize" behavior that may have been caused by socio-economic conditions. The criminal justice system has both the challenge and the opportunity of assisting in breaking the vicious and destructive cycle that results in disproportionate numbers of Native and Black offenders being caught up in the system.

At present, diversion programs are used mainly in relation to young offenders. Such programs can be of particular relevance to Native and Black youth because they may require educational, life-skills, and job-related training in order to steer them away from more long-term problems with the law. Programs dealing with Native youth in various parts of the country have attempted to address the range of problems associated with youth involvement with the law, and these initiatives should be encouraged.

However, we believe diversion programs should be broadened to include adult Black and Native offenders. This would require an amendment to the *Criminal Code*.

Recommendation 18

We recommend that the Province, in close cooperation with the Native and Black communities, formulate proposals for the establishment of appropriate diversion programs for Natives and Blacks, and that the Province actively recommend such programs to the Federal Government with proposals for any necessary amendments to the Criminal Code.

2.2.7 Corrections

The research done for the Royal Commission confirms our view that correctional institutions in Canada and in Nova Scotia are populated primarily by the young, the poor, and members of racial minority groups. According to respondents in our survey, the first thing that needs to be done to improve the corrections system is to improve the attitudes and behavior of guards and other correctional authorities. The second priority should be to provide programs and services to offenders and ex-offenders.

Recommendation 19

We recommend that the Department of the Solicitor General of Nova Scotia take steps to, and urge the federal correctional authorities to take steps to:
(a) *immediately implement programs to recruit and hire more Natives and Blacks in professional and non-professional positions in the correctional service;*
(b) *implement ongoing education and training programs designed to sensitize correctional workers at all levels to the particular needs of Native and Black offenders based on their racial and cultural background;*
(c) *indicate to all correctional workers that discriminatory conduct (including racial slurs) against Natives and Blacks will not be tolerated and may result in adverse employment consequences;*
(d) *offer institutional programs emphasizing the educational, cultural and religious needs of Native and Black offenders in institutions where a significant number of Natives and Blacks are incarcerated; and*
(e) *support rehabilitation programs for Native and Black inmates and former inmates which take into account their background and needs.*

The correctional service, like other segments of the criminal justice system, must make a serious effort to achieve an appropriate representation of Natives and Blacks in both professional and non-professional positions.

In addition, everyone who works in a correctional institution or in the correctional service must receive proper training concerning the social, cultural and economic basis for the problems of visible minority offenders, so he or she will be able to deal sensitively with these offenders.

The correctional service administration also has a role to play in making sure that those working in corrections treat all inmates equally, regardless of their race, and must make it clear that prejudicial or racist treatment will be dealt with harshly. Internal procedures are also needed to ensure that racism is not practised or tolerated in the correctional service.

Rehabilitation is particularly important for Native and Black offenders, but most prison programs, according to respondents to our survey and other observers, focus on security and punishment requirements rather than on rehabilitation.

Correctional authorities should attempt to give inmates the confidence and skills to re-enter society as people who can function without resorting to crime. Education and skills training are a crucial part of this process.

For visible minority offenders, however, there is an added dimension. We have earlier concluded that Natives and Blacks are treated differently than Whites because of their race. Because of this, it is necessary that racial factors be recognized within the walls of the institution. We suggest that, where there are sufficient numbers in an institution to justify them, specific programs for Natives and Blacks should be established, taking into account their education, social and religious needs.

These needs must also be considered when it is time for visible minority inmates to leave the institution. Service agencies such as the John Howard Society should be funded to sponsor programs to help Native and Black offenders integrate themselves into the community after prison. Providing a minority liaison person to assist offenders in making the transition to the outside world, for example, would fill a real need.

Too often, programs of this type are dependent on short-term project funding. The Solicitor General's Department should provide longer term financial assistance to such worthwhile initiatives.

2.3
Nova Scotia Micmac and the Criminal Justice System

At the time of the killing of Sandy Seale in 1971, Donald Marshall, Jr. was a 17-year-old Micmac youth living on the Membertou Reserve in Sydney, Nova Scotia. His parents were well-respected members of the reserve community. Donald Marshall, Sr. is the Grand Chief of the Micmac Nation. His son, Donald Jr., (known to his friends and family as Junior) is one of the Marshalls' ten children - six boys and four girls. At home and on the reserve, he spoke Micmac, although not exclusively. When he went to school in Sydney, however, he spoke English. He left school during grade six, and at the time of Seale's murder, was working part time in his father's drywall business.

Sydney is the third largest city in Nova Scotia with a population of 35,000 people. The economy is based mainly on the steel and coal industry. The Membertou Reserve, located within the city of Sydney, is close to the downtown and within about a half-mile of Wentworth Park. About 500 Micmac live on the Reserve. A fair number of Blacks also live in Sydney, primarily in the Whitney Pier area. At the time of his death, Sandy Seale's family had recently moved from Whitney Pier to Westmount on the outskirts of the city.

It is difficult today to determine the existence or extent of racial problems in Sydney in 1971. Some witnesses at the Royal Commission described the city as a "redneck town", but there is no reason to believe Sydney was any more racist or "redneck" than any other small city in the region, or elsewhere in Canada. Although some Native witnesses at the public hearings suggested the relationship between Whites and Natives in Sydney was not a particularly comfortable one, there is little evidence of overt hostility between the White and Native communities, or between the White and Black communities in Sydney, or between the two minority communities.

We have concluded that Donald Marshall, Jr.'s status as a Native contributed to the miscarriage of justice that has plagued him since 1971. We believe that certain persons within the system would have been more rigorous in their duties, more careful, or more conscious of fairness if Marshall had been White.

The discussion and recommendations that follow go beyond merely looking at what might happen if there was a situation similar to the Marshall case in 1989. If Marshall's treatment in this case occurred because he was a Native, then other Natives will have - and have had - similar experiences. We have attempted to look at the ways in which Natives interact with the justice system, to determine where and how the system has failed them.

> ... The overrepresentation of Native peoples in our prisons is the result of a particular and distinctive historical process which has made them poor beyond poverty. And that process is the process of colonization, whereby we, as a dominant society, have come to North America and have sought to make over Native people in our image. That process has left Native people, in most parts of the country, dispossessed of all but the remnants of what was once their home lands ... It's a process which is recognized as having the inevitable consequence of causing immense social and personal demoralization everywhere it has happened in the world. We have recognized the consequences of that in Africa. We have embarked and almost completed, with the exception of South Africa, the process of decolonization. In Canada, we haven't yet recognized that we have that problem. And yet, it is, in my estimation, the central problem which lies at the root of horrendous figures relating to Native people in the criminal justice system.

Professor Michael Jackson
Consultative Conference Proceedings
Volume 7, Page 6

Having found that Marshall was denied justice because he is an Indian, and that Indians suffer adverse effects from the predominantly White criminal justice system, we need to find ways to change the system. Native Canadians have a right to a justice system they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.

Many Natives feel that the criminal justice system - including police, lawyers, judges and courts - is not relevant to their experience, not only in terms of its language and concepts but also in terms of its essential values. Natives rely on resolving disputes through mediation and conciliation, methods which emphasize reconciliation rather than laying blame. Those traditional values frequently clash with our adversarial system. That means that if we are going to change the criminal justice system, either in substance or in its delivery, we must take into account the unique historical and cultural background of Native people.

2.3.1 Micmac communities in Nova Scotia

Dr. Scott Clark's research for the Royal Commission entitled "The Mi'kmaq and Criminal Justice in Nova Scotia" (Volume 3 of this Report) provides a useful description of Nova Scotia's Native community. Virtually all Native people in Nova Scotia are Micmac. They are now divided into 13 bands. The three largest reserves are Eskasoni, a rural reserve an hour's drive from Sydney, which has a population of just over 2,000; Shubenacadie, near Halifax, which has a population of 1,144; and Membertou, which is located within the city of Sydney and has a population of 523. Membertou, of course, is where Donald Marshall, Jr. grew up. The other ten bands have a combined population of 3,000. There are also perhaps another 1,760–3,500 non-status Indians living off reserves.

Nova Scotia Micmacs are generally young. The result is that there are a large number of dependents in the communities and that creates pressure on governments - both band and federal - to provide programs, services and employment for the reserves.

Our research indicates that conditions on Micmac reserves are unacceptably poor. Micmac households have lower incomes and lower living standards than non-Indian households. Clark has estimated that the unemployment rate for Natives on reserves in Nova Scotia is at least 50 percent. Suicide rates and incarceration rates are also significantly higher than in the non-Indian population, particularly among the young. Natives represent about nine percent of the Canadian prison population and only about two percent of the total Canadian population. They are also disproportionately represented - although not to such a great extent - in Nova Scotia prisons.

Clark focussed his research on the three largest communities — Eskasoni, Shubenacadie and Membertou - in order to get a representative picture of the problems they experienced, the services offered and the communities' perception of the criminal justice system.

All three of these reserves have a very high unemployment rate, with most of those employed working on the reserve. All three offer the services of or access to Native Alcohol and Drug Abuse Counselling Association, social services and employment services staffed by Natives.

Of the three, only Eskasoni has a school on the reserve, offering classes through grade nine. Children at Shubenacadie and Membertou must attend school in adjacent White communities.

Eskasoni operates its own Native police force, which reports to the band council as well as to the local RCMP. There are no legal services offered on the reserve and residents must go to court in Sydney or Baddeck. Shubenacadie is policed by RCMP special constables, under the so-called "Option 3(b)" program, which provides for the appointment of special Native constables. Membertou comes under the jurisdiction of the Sydney City Police. All three reserves note a high proportion of assaults relative to personal and other property crime. Impaired driving charges are also common. There are no Native court worker services available in Nova Scotia, although such services were offered until the mid-1970s.

2.3.2 Legislation, treaties and the Constitution

It is not always easy to determine which Government - Federal or Provincial - has jurisdiction over Natives. The provinces have authority over the "administration of justice" within their boundaries, but the *Constitution Act, 1867* confers exclusive jurisdiction over Indians to the Federal Government. Section 88 of the *Indian Act* provides that all provincial laws may apply to Indians and lands reserved for Indians, subject to the terms of any treaty or federal legislation.

While our mandate is provincial, it would be impossible to discuss issues relating to Native people without to some extent treading on federal turf. The instrument for implementing federal policy regarding Indians is the *Indian Act*. Most on-reserve services are provided directly or indirectly by the Federal Government through the Department of Indian Affairs and Northern Development. But some services, such as education and child welfare, are delivered partly or wholly by Provincial Governments, usually with federal financing. Provincial Governments, under current federal policy, also take primary responsibility for providing services to status Indians living off reserve.

To add to this jurisdictional maze, there is the extremely important question of the status of the treaties that the Crown and the Micmac agreed to before Confederation and the signing of the *Constitution Act, 1867*.

In 1752, the Crown and the Micmac signed a "Treaty of Peace and Friendship", one of a series of agreements through which Britain was able to reduce conflicts between its settlers and the continent's indigenous peoples during a critical phase of North American history. According to Article 4 of the 1752 treaty, "the said tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual." According to Article 8:

> ...all disputes whatsoever that may happen to arise between the Indians now at Peace and other of His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, advantages and privileges as any other of His Majesty's subjects.

On the basis of these and other treaties, including the Royal Proclamation of 1763, the Micmac believe they have special rights that must be protected, and which are now guaranteed by Section 35(1) of the *Constitution Act, 1982*. That Act provides that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

The existence and extent of these treaty rights, however, are currently the subject of dispute between the Nova Scotia Government and the Micmac people. In 1985, the Supreme Court of Canada in *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, overturned the conviction of a Native named James Matthew Simon for possessing a shotgun and shells during closed season, contrary to the Nova Scotia *Lands and Forests Act*. Simon, who was hunting, was travelling on a public road adjacent to the Indian Brook Reserve near Shubenacadie at the time of the alleged infraction. He used the guarantees of the 1752 Treaty as the basis for his defence. In its ruling, the Supreme Court of Canada recognized the validity of the treaty. "The treaty, by providing that the Micmac should not be hindered from but should have free liberty of hunting and fishing as usual, constitutes a positive source of protection against infringement on hunting rights." (Dickson, C.J. at Page 401)

The Micmac believe this decision represents an important milestone, with implications that go far beyond the question of hunting and fishing rights:

The Mi'kmaq Treaty Handbook, Page 13
Native Communications Society of Nova Scotia, (1987)

> The Supreme Court of Canada's 1985 decision in *James Matthew Simon* v. *The Queen* confirming the validity of the Treaty of 1752, is of great consequence. The judgment clearly attests to the continuing existence of at least some Mi'kmaq treaty rights, and it indirectly substantiates many of our long-standing claims against the government of Canada. Additionally, it gives credence to the proposition that government initiatives to promote Mi'kmaq self-sufficiency should flow from, or be consistent with, our 235-year-old relationship with the Crown.

The Government of Nova Scotia and the Micmac have recently entered into an agreement providing for a special Native Hunt. This to a degree has resolved the problems arising out of the Simon case. However, as prosecutions instituted before the agreement was reached are still proceeding, it would be inappropriate for us to comment on the *Simon* decision.

The recognition in the *Constitution Act, 1982* that aboriginal people have a special place in Canadian society is a very significant development. The Federal Government, in fact, supports a constitutional amendment to provide for self-government for Native peoples. At the First Ministers' Conference held in 1985, Prime Minister Brian Mulroney acknowledged the importance of self-government, saying that:

> Constitutional protection for the principle of self-government is an overriding objective because it is the constitutional manifestation of a relationship, an unbreakable social contract between aboriginal peoples and their governments.

Although the Federal Government remains committed to the goal of a constitutional amendment, three First Ministers' Conferences on aboriginal issues have so far been unsuccessful in achieving the necessary agreement to get such an amendment, so the focus has shifted to negotiated self-government agreements at the community level. The decision to proceed with such negotiations remains with the individual Native community.

There is, as we have noted, a clear trend at the Federal Government and Supreme Court levels to having Native communities take increasing control over their own lands, services and futures. Native rights are now beginning to be recognized by governments, courts and the public. Our recommendations on Native issues will be set against this background.

2.3.3 Framework for our Recommendations

Until recently, it has been assumed that the best thing Natives could do was to assimilate into the mainstream of society because, after all, White society is more "civilized" and affluent. Why would anyone want to preserve a way of life that is so lacking in services, employment and economic prosperity? Why would Native people not want the advantages of full participation in a White society?

To even ask these questions, of course, indicates a not uncommon ignorance of the strength and traditions of Native society, and the pride Natives take in their society.

As aboriginal peoples, Natives lived in what we now call Canada thousands of years before the English and the French colonized it. They had their own established ways of living and settling disputes. These were based not on our adversarial system - confrontation, determination of guilt and then punishment of the offender by the State - but on mediation between the parties, with restitution to the victim and to the community. There was not just one person sitting in judgment either. Community elders and leaders settled disputes, and they based their decisions on what they believed was best for the whole community. This community-based approach to justice may be different than our method of resolving disputes, but that does not make it any less valid.

The list of Native criticisms of how our judicial process affects them is long. To begin, they argue that it is not relevant to the real lives of Native people. The court is an unfamiliar and intimidating institution, conceptually removed from the indigenous processes of social control based on mediation and restitution. It is usually physically removed as well. Most courts are located some distance from reserves, making it difficult for Natives to attend. In addition, many Natives, especially those from rural reserves, have problems comprehending the English language. When you add to those things the reality that all the faces in the justice system are White, that Natives constitute a small minority of the population and that Natives suffer from stereotyping and other forms of discrimination, you begin to understand why Natives are unhappy with the current system of administering justice.

The Royal Commission has considered many possibilities for dealing effectively with these problems. One approach would be to identify each problem and then deal with each one individually. For example, their problems with language could be solved by having Native interpreters available in court; their lack of familiarity with court procedures and concepts could be tackled by establishing a professional court worker service; their isolation from the court itself could be remedied by having provincial court judges actually hold court on reserves; their concerns about using their own traditional ways of settling disputes could be addressed by making some adaptation to the structure of sentencing. All of these solutions (and others) are important, and will be the subject of discussion and recommendation by the Royal Commission.

But this is a piecemeal approach. It does not address the differences between Native and White societies, or the argument of some Natives that justice for Natives must be on Native terms and according to Native concepts. Having looked at the problems and the options, we believe the time has come to deal with these broader concerns by establishing - on an experimental basis - a Native Criminal Court that will allow Natives some measure of direct control over the administration of justice within their communities.

2.3.4 Native Criminal Court

At a conference on Indian justice held in Saskatoon on October 12, 1983, the Minister of Indian Affairs stated that:

> Justice is a basic need in the life of every person. It has confronted, challenged and concerned every society which ever joined together for mutual benefit. ...The law belongs not to governments, not to bureaucrats, not to lawyers, but to the people. ...The many alternative means of resolving disputes suggested now - mediation, arbitration, restitution, reconciliation, to name a few - are the very methods which are part of customary law. ...Native peoples have been deprived of their own traditional laws, concepts of justice and legal procedures. We realize that the Native peoples of Canada expect a system of justice that reflects their own cultural heritage.

We accept these comments of the then Minister. We agree some degree of control should be accorded to Native people in respect of their institutions of justice. A Native Criminal Court is one way to return to them some degree of control over Native justice.

Recommendation 20

We recommend that a community-controlled Native Criminal Court be established in Nova Scotia, initially as a five-year pilot project, incorporating the following elements:
(a) *a Native Justice of the Peace appointed under Section 107 of the* Indian Act *with jurisdiction to hear cases involving summary conviction offences committed on a reserve;*
(b) *diversion and mediation services to encourage resolution of disputes without resort to the criminal courts;*
(c) *community work projects on the reserve to provide alternatives to fines and imprisonment;*
(d) *aftercare services on the reserve;*
(e) *community input in sentencing, where appropriate; and*
(f) *court worker services.*

A Native community may choose to opt in or out of the model Native Criminal Court we propose. That is and must be recognized as its right.

The proposal we make is modest and will not completely satisfy the demands of some Native groups. However, we believe the proposal is sound and, while experimental in nature, should either chart the way for future development in Nova Scotia, or result in a recognition that, for whatever reason, Native Criminal Courts are not appropriate here.

We wish to make it clear that the Native Criminal Court we propose will administer the same law as applies to all other Canadians. We do not propose a separate system of Native law, but rather a different process for administering on the reserve certain aspects of the criminal law. The laws enacted by Parliament and the Legislative Assembly will continue to apply to Natives, and the safeguards for accused persons under the Charter would apply in any Native Criminal Court. In the event that any Native customary law is introduced, it would be only after the period of study noted in our next recommendation.

Any sort of Native court system will no doubt seem threatening to some. There will be those who will say, "Why should the Natives get their own justice system?" The answer: "Because they are Native." As aboriginal people, the Micmacs not only have a history and culture that thrived in Nova Scotia before the province was colonized by Whites but they also had in place their own successful methods for resolving disputes.

As noted in our recommendation, Section 107 of the *Indian Act* already provides a mechanism by which a limited type of Native Criminal Court can operate. Under that section, the Federal Cabinet may appoint persons to be justices of the peace to adjudicate cases arising under the *Indian Act* and summary conviction offences under the *Criminal Code*.

Two reserves in Quebec - Kahnawake and St. Regis - have established courts under this authority. The Court of Kahnawake, which we took the opportunity to visit during our deliberations, is a positive example of how Native people can successfully take some control over their own justice institutions. While limited in the scope of their authority by the terms of their appointment, the Native Justices of the Peace have managed to take account of the particular needs of Native people while still upholding the laws of the larger community. By using Native court personnel and court workers, an informal court process and sentencing with community and individual needs in mind, the Native Justices of the Peace appear to have struck an appropriate balance between the old and the new ways. They are now attempting to obtain funding to include mediation and diversion facilities in the range of services provided. Under the Kahnawake model, the Court has jurisdiction over summary conviction offences committed within the boundaries of the reserve, whether by Natives or non-Natives; appeals are taken either to provincial or federal courts depending on the offence.

Critics of the Court of Kahnawake feel that by simply enforcing 'majority' laws, the Court does not go far enough in recognizing the customary law of the Native people. It is true that courts established under the *Indian Act* authority do not provide an answer to the question of the full acceptance of indigenous Native justice mechanisms. But with the benefit of the services recommended in our proposal (some of which are now provided at Kahnawake), the Kahnawake model provides a good starting point for discussion.

It is wrong to think that Native people who wish to see Native traditions reflected in their justice procedures merely want to turn back the clock to simpler times. Changes in the Native and non-Native way of life have brought changes in our laws that cannot be ignored. An accommodation can be reached between Native traditions, human rights law and the Charter, so that the end result will be relevant to Native people and consistent with the protections provided to all Canadians. The historical and cultural justification for establishing Native justice systems must override the fear of problems which might arise. The Court of Kahnawake, for example, shows it can be done.

Future development of Native Criminal Courts in Nova Scotia will be determined by a number of factors:

- *the will and ability of the Micmac people and their leaders to move in this direction;*
- *the political will of the Federal and Provincial Governments to resolve outstanding issues and to support the development of the proposal;*
- *the establishment of a body to do the required development work; and*

- *the establishment of a tripartite forum (Micmac, Provincial and Federal Government) for the discussion and negotiation of a Micmac justice system.*

The development of a community-based justice system will require a research and information base, and coordination between the bands, the Native political organizations and Government. When the Court is established, training of personnel and legal research will become necessary. Because of the importance of Native justice issues in Nova Scotia, we believe that long-term assistance must be given to Nova Scotia Micmacs in order to facilitate this effort.

Recommendation 21

We recommend that a Native Justice Institute be established with Provincial and Federal Government funding to do, among other things, the following:
(a) *channel and coordinate community needs and concerns into the Native Criminal Court;*
(b) *undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people;*
(c) *train court workers and other personnel employed by the Native Criminal Court and the regular courts;*
(d) *consult with Government on Native justice issues;*
(e) *work with the Nova Scotia Barristers Society, the Public Legal Education Society and other groups concerned with the legal information needs of Native people; and*
(f) *monitor the existence of discriminatory treatment against Native people in the criminal justice system.*

Differences between Micmac and Government involving the administration of justice could be dealt with in a tripartite forum with representatives from the Micmac, the Provincial and Federal Governments. The Ontario Indian Commission, while not a perfect model, shows that such a mechanism can be extremely effective. Established in 1978 by agreement between representatives of the Governments of Ontario and Canada and Ontario Indian leaders, its purpose was to examine, discuss and set priorities for identifying and negotiating all matters affecting the Indian people of Ontario and their relationship with the Governments. If a similar structure were implemented in Nova Scotia, the parties could also agree that the negotiation of justice issues would be part of the agenda.

Recommendation 22

We recommend that a tripartite forum (Micmac/Provincial/Federal Government) similar to the Ontario Indian Commission be established to mediate and resolve outstanding issues between the Micmac and Government, including Native justice issues.

2.3.5 Interpreters

As we pointed out earlier, there are many specific problems relating to the administration of justice that will still need to be dealt with, regardless of whether our recommendation for a pilot Native Criminal Court project is accepted. These include everything from the need for Native court workers to interpreters to assist Native accused in dealing with the criminal justice system.

Recommendation 23

We recommend that all courts in Nova Scotia have the services of an on-call Micmac interpreter for use at the request of Micmac witnesses or accused.

The Royal Commission has been told about some of the differences between Micmac and White concepts and language. Several Micmac witnesses, including Donald Marshall, Jr., testified before us, so we were able to observe their reaction to the court-like process of the Inquiry. That gave us first-hand knowledge of some of the problems Natives may experience in such a setting.

In addition to our observation of Marshall's testimony before us, we also read the transcript of his testimony at his Supreme Court trial and at the Reference before the Appeal Division of the Nova Scotia Supreme Court. There are obvious differences. Before the Supreme Court and the Appeal Division, the Court asked Marshall on at least 29 occasions to speak up or remove his hand from his face so he could be heard. While Marshall is naturally soft-spoken, the court's numerous interventions probably compounded his discomfort, and may have seemed to Marshall as evidence that officials were harassing him or were at least hostile toward him. The Court, on the other hand, may have regarded Marshall's demeanor as a negative factor and that may have influenced the ultimate disposition of the hearings.

When he appeared before this Royal Commission, Marshall gave his evidence in the Micmac language with the assistance of an interpreter. It is obvious the interpreter helped him speak more freely and eased some of the tensions associated with examination and cross-examination by lawyers, and the questioning of judges. Since he understands English, the questions were asked in English and Marshall responded to the interpreter in Micmac. In a subtle way, what appeared to be a conversation between the witness and the translator replaced the direct and potentially antagonistic interchange between lawyer and witness. Marshall's ability to express himself freely in his native language introduced a comfort level to the proceedings we sense was absent in his other court appearances. This had a positive effect in obtaining the best evidence possible from the witness.

Skeptics may question the use of an interpreter with a witness such as Marshall, who appears fluent in English. But, as one person explained, apparent fluency is not the only consideration.

Department of Justice Canada,
Review of Criminal Court Worker Program
of Native Counselling Services of Alberta, (1981)

> It's not just a question of language. I don't understand the Native tongue and many Natives do speak English - but they still don't understand. They still need an interpreter. English is different from legal English and talking in court is different from just talking.

The problem is compounded because of differences between the Micmac and English languages that affect the way a Native person may understand court proceedings. Bernie Francis, a former Native court worker who now teaches literacy in the Micmac language, appeared as a witness and offered several examples of words or thoughts that have no direct Micmac translation. Consider the word "guilty", for example:

Transcript, Page 3931

> **A.** There really is no such word as 'guilty' in the Micmac language. There is a word for "blame." So an Indian person who's not as knowledgeable let's say in the English language, if he were to be asked if he were guilty or not, he would take that to mean, are you being blamed or not, and that's one of the reasons I found that Native people were pleading guilty is because they suspect that the question was, "Is it true that you're being blamed?", and the Native person, of course, would say "Yes...." What they neglected to say was, "Yes, I'm guilty that I'm being blamed but I didn't do it."

Francis gave another example, in which a judge's use of the word "we" - as in, "We're going to have to do something about you" - might be misinterpreted by a Micmac accused because of the meaning given to the word in the Micmac language.

Transcript, Page 3933

> **A.** ... Now in the Micmac language there are two 'we's'. There's 'we' inclusive, where you include the person you're talking to and then there's another pronoun which also means 'we' but it's 'we' exclusive, where you exclude the person you're talking to. So usually when you say 'we' in the English language you take it to mean that the 'we' inclusive form is being used and the Indian person understood that. The Judge is going to include me in the decision making here, and therefore I'll have an opportunity to speak a little bit more then. ... But then the next thing he realizes that he has already pleaded guilty and he's being carted off to jail. ... He wasn't even included. He wondered why he wasn't included after the Judge saying that he would be by saying: 'We'll have to do something about that'.

In many instances, a complete statement or thought - which in English would require a noun, verb and object - can be expressed with only one Micmac word. This leads to difficulties in transposing from one language to the other and is a factor that may lead many to think of Micmac people as being shy, withdrawn, or uncommunicative. According to Francis, Micmac people speak in a flat tone of voice with little or no inflection, which might also cause non-Natives to think they are uninterested in what is going on, unresponsive or unintelligent.

These language differences are exacerbated in a formal setting such as a courtroom. The natural intimidation with the process and the confrontational and adversarial nature of the questioning, combined with these identifiable conceptual and language differences, result in Native witnesses and accused appearing ill at ease and unwilling to volunteer information to judges, juries and lawyers.

Many have said that Native people will do almost anything to avoid going to or spending time in court, including pleading guilty unnecessarily or changing their evidence in order to give their questioner the answer they believe he or she wants to hear. Once again, Francis' evidence illustrates the reality of the problem:

Transcript, Page 3936

> A. ... I think during an informal setting, you know, the Indian people do okay because along with their limited English they could also make gestures and point and so on and, you know, the English language is ... put very simple to them and there's no ambiguity in a lot of cases, and if there is ambiguity they're not worried about it because they are not in a formal setting, but when they're on the witness stand it was a different story, the questions were more formal and precise answers were ... requested and so on. It would make it very difficult for them to understand.

It is disturbing to think of a young Native person, such as Donald Marshall, Jr., on trial for a very serious offence, in an environment where, because of his Native background, he is unable to make a full defence based on a variety of factors beyond his control.

If we seek to obtain the best evidence from all witnesses, to assume innocence until guilt is proved and to give all accused the resources to assert their innocence, we must deal seriously with these subtle language problems.

2.3.6 Native court workers

While the use of an interpreter will alleviate some of the language difficulties, the problems go much deeper than mere language comprehension.

Recommendation 24

We recommend that the Provincial and Federal Governments, in consultation with Native communities, work together to establish a Native court worker program, as an immediate first step in making the criminal justice system more accessible to Native people.

The first court worker program in Canada was established in Alberta in 1970 and the program undertaken by Native Counselling Services of Alberta is still the most comprehensive and highly regarded in the country. The percentage of Indians as inmates in provincial institutions, for example, has decreased from 58 percent to 28 percent, and many credit this to the effective work done by the Native Counselling Services. Its Executive Director, Chester Cunningham, was one of the experts who attended our Consultation in November 1988.

The benefits of a court worker program are evident in the following comments from judges being interviewed for an assessment of the Alberta program:

Department of Justice evaluation, 1981, p. 62

> Throughout the extended conversations with the judges, it is apparent that the Bench, for the most part, is aware of the bewilderment that many Natives experience in the legal system, and particularly in the courtroom setting itself. The ritualistic formality and sense of coded behavior, the 'suit and tie' atmosphere, the monotone 'legalese' of the courtroom English, the depersonalized conveyor belt sense of processing ... as the judges face a lengthy docket and limited time - all these would combine to shake the confidence of even a person well seasoned in systems. Within this setting, language and interpretation become pivotal. Often, as the judges themselves are keenly aware - it is difficult to get beyond 'yes' or 'no' responses to the essence of what the Bench needs to know in order to make an informed and sensitive decision. Indeed in the clear words of yet another Native court worker, 'Most Natives don't talk in the grey area of extenuating circumstances.' It is easy to see, then, how it is that the Bench has come to identify the Native court worker as a 'communication device,' bridging the interests of both the court and the Native accused. It is to the credit of our court system that so many of the judges who were interviewed could have spoken the words of one of their number: 'Someone who speaks their language or understands their background instills more confidence than I could no matter how well-meaning I am. In this way, the purpose of Native Counselling is all about communication and justice.'

At one time or another, all provinces in Canada have had court worker programs, although several, including Nova Scotia, have discontinued them.

A Native court worker does not give legal advice but acts as a paralegal. A properly trained court worker can bridge the gap between the Native person with little or no knowledge of the criminal justice system and the system itself. The role of the court worker - who would be available to all Native people, on or off the reserve - should include a variety of functions, including:

- *arranging for the provision of legal services, if required;*
- *explaining the charge and plea options, as well as courtroom procedures;*
- *translating for the client and counsel if requested, if a translator has not been provided;*
- *assisting the client in getting to court appearances or meetings with counsel,*
- *explaining the client's rights and obligations in the process;*
- *explaining the role of Crown and defence counsel, and judge and jury; and*
- *other assistance as required.*

An effective court worker can also help sensitize non-Native personnel in the criminal justice system to the needs of Native people.

One of the most frequent criticisms of court worker programs is that the method of providing funding as well as the amount of funding allocated is not sufficient, resulting in inadequate staff training and too few staff to meet the demand. Establishing a Native court worker program will cost money. However, the cost will be more than justified if the program provides - and is seen to provide - much-needed assistance to Native people in the court system.

2.3.7 Provincial Courts on reserves

Recommendation 25

We recommend that the Chief Judge of the Provincial Court take steps to establish regular sittings of the Provincial Courts on Nova Scotia reserves.

Some Micmac leaders and criminal justice personnel have suggested that establishing Provincial Court hearings on reserves would be another positive way of bridging the physical and conceptual distance between Micmac communities and the Courts. While such a move would be a change in form only, and not in substance, and would not deal in a significant way with the deep-seated feeling of alienation Micmac people have for the criminal justice system as a whole, it would be an important and easily implemented gesture of respect for the special concerns of Natives within the justice system.

For reserves that do not choose to adopt the Native Criminal Court proposal we made earlier - and until our recommendation for the establishment of Native Criminal Courts is implemented - Provincial Court sittings on reserves for on-reserve offences should be supported.

There would undoubtedly be a number of positive side effects from such a move. Native accused would be more likely to show up for court appearances, for example, since distance would not be a problem and since the community would likely monitor court appearances more closely. Micmacs would believe they had a greater stake in the system if they could actually see it operating in their own communities. At the same time, justice system personnel, including judges, would gain a greater understanding of Micmac concerns and reserve conditions if they were required to do a regular reserve circuit.

2.3.8 Lawyers' duty to Native accused

Clark's research identified several areas in which Micmacs seem dissatisfied with the treatment they receive from lawyers. These include access to counsel, inadequate explanation of the proceedings and concerns regarding plea bargaining. Many of these concerns can be resolved if some of our other recommendations - "educating" the bar about the problems facing Native clients, directed public legal education programs and implementation of the Native court worker program - are implemented.

On the basis of what we have heard, access to legal counsel was not a problem for Donald Marshall, Jr. in 1971, and it does not appear to be a problem today. Legal aid lawyers are available throughout the province, and the fact that there are no legal aid offices on reserve does not appear to pose a problem for Native clients.

We do get the clear impression, however, that legal aid counsel are overworked. While this has an effect on all Nova Scotians who are eligible for and require legal aid services, it has a particularly negative effect on Native clients who may require more time with their lawyer than a non-Native client because of their fear and lack of knowledge of the justice system. The legal aid lawyer's lack of time, coupled with the natural communication problems Natives may have in dealing with representatives of the legal system, combine to make Native clients feel they are being poorly served.

Some of these problems indicate the different perceptions Natives and legal aid lawyers have of their duties. Clark says many Natives he interviewed believed legal aid lawyers would rather plea bargain for a lesser sentence than pursue the matter forcefully. Says Clark: "This contributes to the belief already held by many Micmacs that all justice system personnel, including defence counsel, are in league against the people being served. Often this is further perceived as discrimination against Indians." (Volume 3, Page 46) On the other hand, most lawyers see plea bargaining as a way of getting the best possible "deal" for their client.

If these differences in perception are to be addressed, it will be necessary for Legal Aid to develop expertise in dealing with Native issues.

Recommendation 26

We recommend that Nova Scotia Legal Aid be funded to permit them to:

(a) *specifically assign lawyers to work with Native clients to develop a specialization with respect to the concerns of Native people; and*

(b) *hire a Native social worker/counsellor to, among other things, act as a liaison between Native people and the Legal Aid service.*

There needs to be ongoing liaison between lawyers and Native people. The Nova Scotia Barristers Society should organize such programs in consultation with the Native people.

Recommendation 27

We recommend that a program of ongoing liaison between the bar - prosecutors, private defence and legal aid - and Native people, both on and off reserve, be established through the Nova Scotia Barristers Society. The Society must also educate its members concerning the special needs of Native clients.

2.3.9 Juries

The lack of Natives on juries in Nova Scotia concerns members of the Native community. We know of no evidence that suggests Natives are deliberately excluded from jury duty in Nova Scotia. Nor can we argue definitively that the presence of a Native person on a jury in a case involving a Native accused will result in fairer treatment for the Native. Still, Native concerns are not unreasonable: Would a White person facing a Native prosecutor, defence lawyer, judge and jury, have some apprehension whether he would get as fair a hearing as if everyone were White?

Since the *Juries Act* was amended in 1985, the jury list is prepared from the latest available election lists. Given their small numbers in the population, it is not surprising that few Native persons get on jury lists. Even in cases where Natives get on the jury lists, of course, they may not be selected for the actual jury hearing a case, even those involving Native accused. It has been indicated to us that, in fact, no Native has ever been on a jury in Nova Scotia. We were given no explanation for this. We do, however, urge those involved in selecting juries for trials involving Native people - both prosecutors and defence counsel - not to automatically exclude Natives simply because they are of the same race as the accused.

In their final argument to the Royal Commission, counsel for the Department of Attorney General recommended a study be done concerning proportional representation of visible minorities on juries in Nova Scotia. We endorse such a recommendation.

2.3.10 Police models

Nova Scotia now uses three different models for on-reserve policing. Membertou, located within the boundaries of the city of Sydney, uses the services of the Sydney City Police Department, a totally non-Indian force. The Shubenacadie reserve is policed by RCMP Special Native Constables under the Option 3(b) program. Eskasoni, a large rural reserve, has its own reserve police appointed under the *Indian Act*, in conjunction with the RCMP in Sydney.

What are the problems associated with each model? At Membertou, with no reserve police presence, Sydney City Police officers are called to the reserve only on particularly serious occasions, and our research indicates that Natives here were least likely to report a crime to the police.

At Shubenacadie, where Natives patrol as Special Constables of the RCMP, our research indicates that Special Constables are in a difficult position. Their superiors expect them to enforce the law as any RCMP officer would, while the Native community expects them - as Natives policing their own community - to exercise leniency towards their own people. Clark reports that this conflict can lead to mistrust of the Special Constables on the reserve, which can also result in Natives not reporting crimes or cooperating in investigations. This is a dilemma. In Clark's words:

Volume 3, Page 37

> The upshot of these general concerns at the community level is often a police officer who acquires respect neither as a policeman (because he tries to strictly enforce the law according to a non-Native, urban policing model), nor as a community member (because he is not perceived to be upholding the community's best interests).

At Eskasoni, with its own on-reserve force, Natives indicated the greatest likelihood to report incidents to the police. The most significant problems at Eskasoni tend to relate to funding, training and the adequacy of equipment and facilities. The Eskasoni police tend to have more flexibility than RCMP Special Constables to use such alternative dispute settlement mechanisms as mediation, but they must rely on the RCMP in Sydney for back-up, so they are not entirely independent.

What do Micmac communities want and need from their police forces that are not being provided by existing policing arrangements? Dr. Clark provided us with a list of needs frequently expressed to him in interviews with community leaders, community members, and on-reserve program workers. They wanted:

- *police officers who understand the conditions and pressures associated with reserve life;*
- *police officers who actively engage, through formal and informal means, in crime prevention, particularly among young people;*
- *police who understand, encourage and facilitate Micmac processes of mediation and reconciliation, rather than reliance on arrests and charging;*
- *police who are independent of political and family pressures in carrying out their duties;*
- *improved response time;*
- *improved attitudes concerning Natives generally, especially regarding alcohol abuse and its causes and effects;*
- *improved training for police, especially in the areas of group dynamics and personal interaction, including mediation;*
- *adequate funding for reserve police forces to ensure proper equipment, automobiles and officer facilities; and*

- *on-reserve facilities and concomitant programs designed to assist people in crisis situations.*

There are differing opinions among Micmacs and justice system personnel on the role of police in Native communities. The central question is whether police should act as strict enforcers of the law or take a more preventive, mediation-oriented approach. Most Micmacs see the latter as being more appropriate.

The Mohawk Peacekeeper Force at the Kahnawake Reserve in Quebec is a Native-run policing service that enforces provincial and federal laws on the reserve while attempting to uphold community standards through customary Mohawk approaches to problem-solving. This force seems to be extremely successful in meeting community needs on community terms, while at the same time enforcing "majority" laws.

We had the opportunity to meet with some of the Kahnawake Peacekeepers and were very impressed by their professionalism and community commitment. One of the keys to the success of this initiative, we have been told, is the high level of training provided to the officers, and the fact that they have no lack of police resources or equipment.

We must give all police forces operating on reserves the resources to train their officers in obtaining these same skills. Training in mediation techniques and inter-personal and group dynamics must be part of the instruction all Native and non-Native police officers with on-reserve duties receive. Off-reserve police forces that work in Native communities - such as the Sydney City Police Department and the RCMP - should be urged to employ Native constables.

We realize that this has been tried before with limited success. However, if senior officers demonstrate that they are enthusiastic and understand the concept, Native police will likely integrate with the police forces and be accepted by communities. We do not see this as a complete answer to policing needs, but as a first step and perhaps as an interim measure.

Recommendation 28

We recommend that the RCMP and municipal police forces, where applicable, take immediate steps to recruit and hire Native constables.

The Federal Government is currently engaged in a review of Native policing. We hope that the results of this review will assist in meeting the needs of Nova Scotia Native communities.

2.3.11 Sentencing

Much has been written about the disproportionate representation of Native people in Canadian correctional institutions and prisons. The picture painted by these reports is grim. It is not easy to determine precisely why this situation exists, but Clark contends that a large part of the crime committed by Native people is related to social problems - alcohol abuse, unemployment and poverty. Rather than deal with the underlying causes of these problems, the criminal justice system responds by simply imposing penalties.

We believe the key to solving these problems is to give Native people the right to assume responsibility for social order within their own reserve. In that way, for example, the community itself would be able to deal with these problems in a meaningful way.

One of the real strengths of Native communities is the support mechanism provided by the extended family. Traditionally, elders were largely responsible for social control and dispute resolution, imposing a variety of solutions such as community work, restitution, or the ultimate punishment - banishment - on those who transgressed. Of course, things have changed. The gradual influence of non-Native standards and culture, as well as the dependence on welfare and government support and the relative youth of the Native population, have all largely eroded the power of community elders to exercise the authority they once did. The traditional way of doing things, in justice matters and in other areas, has been overshadowed by the traditions of the dominant society. However, we believe there is still value in integrating the views of the community into sentencing decisions.

Recommendation 29

We recommend that the advice of leaders chosen by the Native community and sitting as a Native Justice Committee be sought by judges in sentencing Natives, where possible.

The Native Justice Committee should play an important role in preparing pre-sentence reports. In addition, the Native Justice Committee could also recommend an appropriate sentence to the presiding judge, taking into account facts relevant to the situation of the Native accused. Although the judge would not be bound by such recommendations - indeed, there are offences for which a specified sentence is mandatory - its input should be taken seriously and referred to in the sentencing decision. Positive side-effects would undoubtedly result from a structured use of community leaders in sentencing. They could also assist in crime prevention for young people, monitor probationers and parolees, counsel young and adult offenders and mediate disputes between conflicting parties. Integrating the community's own social support system into criminal justice issues might of itself provide a disincentive to criminal activity.

2.3.12 Sentence disparity

While sentence disparity between Natives and non-Natives was not a primary focus of our work, our researcher did a cursory and unscientific review of files in the Truro and Sydney Crown prosecutors' offices, and interviewed various players in the system. This review did not indicate a significant variation in sentencing between Natives and non-Natives, or between courts. However, the researcher indicated a clear consensus among those interviewed that certain judges are more - or less - lenient in sentencing Native people. This type of variation between judges is not unusual, and is consistent with the more general, country-wide disparity in sentencing observed by the Canadian Sentencing Commission (1987).

2.3.13 Probation and aftercare

Clark's research uncovered a disparity in the way in which pre-parole reports are prepared. Fewer relevant informants were contacted in Native communities than in non-Native communities, for example. At the same time, some of the information parole officers seek in preparing pre-parole assessments - such as a potential parolee's prospects for employment - are, according to Clark, automatically loaded against Micmacs when they apply for parole because of the unemployment problems on reserves.

Even if they get parole, there are few institutional supports for offenders returning to their reserves. Aftercare programs designed to meet the needs of Native offenders and communities are non-existent except for the overburdened and underfunded Micmac Friendship Centre in Halifax. This is a real concern in light of the large numbers of young Micmacs entering the correctional system. Wherever possible, facilities and services controlled by the community should be available on-reserve.

Recommendation 30

We recommend that the Provincial and Federal Governments facilitate and finance mechanisms by which Native people can have more control over the treatment of Natives convicted of an offence, such as establishing a probation officer capability and community-based aftercare services on-reserve.

2.4
Blacks and the Criminal Justice System

Based on the evidence and the information now before us, we can say definitively that many Nova Scotians - both Blacks and Whites - believe the criminal justice system discriminates against Black people at all levels.

The problem is not simply with the criminal justice system, of course, as racism is a fact of life in Nova Scotia and elsewhere. While this province has a comparatively large Black population, major urban centres such as Toronto and Montreal also have significant Black populations, and recent news reports from all of those places indicate that serious problems in the way in which Blacks are treated in schools and by the police.

This Royal Commission is not in a position to resolve the myriad problems Blacks face outside Nova Scotia or outside the criminal justice system, and we also know we cannot hope to eliminate racism, even in the criminal justice system, just by making a few recommendations.

Our challenge, however, has been to come up with recommendations for specific rules and policy changes that will put Blacks on a more equal footing in dealing with the criminal justice system and at least guarantee them equal opportunity within, and equal access to, the criminal justice system. Some of our proposals are contained in an earlier section of this Report dealing with visible minorities generally. Others will be detailed shortly.

Such recommendations are not a panacea, however. There are even those who insist that relations between Blacks and Whites will only improve when attitudes change, and that attitudes can only change on a personal level. They argue, therefore, that there is no point in enacting specific government policies or legislation to combat racism.

We do not accept that. We believe that by putting legislation and policies into place, society makes it more difficult for people to discriminate against others on the basis of race, and that, in turn, will help to create a climate that will ultimately result in changes in attitudes.

Changing behaviour by legislation is a blunt instrument. Certain behaviour that used to be legal is suddenly illegal and anyone who continues to practice it is guilty of an offence. There are many examples of situations in which governments have used legislation to change behavior and, over time, to change attitudes. Drinking and driving legislation, for example, changed the behavior of drivers, and that eventually changed people's attitudes to drinking and driving. Human rights legislation has promoted the equality of women, and that too has resulted in improved attitudes toward women in society.

Changing attitudes will be difficult and slow, but it must start somewhere. A positive first step will be for governments to show leadership by bringing forth legislation and policies that will make discrimination unacceptable. If we can do that, Blacks will finally - after nearly 300 years - become full participants in Nova Scotia society.

2.4.1 The Black community in Nova Scotia

Blacks are not newcomers to Nova Scotia. Many Black families can trace their roots in this province to the late 1700s and early 1800s. The first major influx of Blacks to Nova Scotia occurred following the American Revolution when about 1,000 slaves - along with more than 2,000 former slaves and several hundred free Blacks - accompanied the United Empire Loyalists to Nova Scotia. Although the British promised the Blacks who came to Nova Scotia suitable land, they were actually given only small plots of rocky, infertile land on which they could not survive. Many left the land and migrated to the towns, where they became, at best, a source of cheap labor at a time when manpower needs were high. As a result, many Blacks became disillusioned and left the province in 1790, moving to more hospitable Sierra Leone.

The second large migration of Blacks to Nova Scotia occurred following the War of 1812. About 3,000 Black refugees fled from the United States to make their homes in Nova Scotia and other parts of the Maritimes. However, a poor harvest resulted in a downturn in the economy, unemployment and shortages of food, and that made conditions very difficult for these Black refugees.

The largest migration of Blacks to Canada occurred between 1820 to 1860 during the period leading up to the American Civil War. Largely through the efforts of the underground railroad, about 50,000 Blacks made their way to Canada. Most, however, settled in southwestern Ontario, rather than on the east coast.

From their first arrival in Nova Scotia, Blacks have faced discrimination and prejudice. The result has been that Black communities tended to turn to their own resources, especially to the Black Church which has provided support and leadership for the community. Its influence remains to this day.

Partly because they were isolated and discriminated against, Blacks as a group have never really been in a position to have a significant impact on the larger society's government or social policy issues.

That is not to suggest that governments and social policies have not had an impact on them. The destruction of Africville in the early 1960s is considered a classic example of this lack of Black influence - or even input - in the decision-making process. Africville was a small all-Black community on the shores of Bedford Basin in Halifax, and although the community lacked many city services, Blacks considered it their home. They wanted the community preserved and provided with services and they pleaded with city leaders to install them. Instead, the City of Halifax cleared the land for redevelopment and dispersed the residents to new housing projects in the city. Even today, Africville is a sore point for many in the Nova Scotia Black community.

One of the reasons Africville was bulldozed was that Blacks had no effective political organizations and therefore very little clout with government. There are a number of reasons why organizing the Black community around political or social issues is still a difficult task. The relatively small number of Blacks in the province combined with the fact that many of their communities are widely scattered, and some are urban and others rural, mean that it is not always possible to have one group address all needs. The recent history of the Black United Front, a provincial lobbying group that has been beset by internal frictions, illustrates the difficulties involved in having one organization attempt to articulate the concerns of a diverse group of people.

However, it is important that such organizations exist and have the support necessary to provide an effective community leadership role because racism is not just an historical legacy. The effects of the legal, political and social disadvantages from which Blacks in Nova Scotia have suffered over the past two centuries are obvious even today: in the lack of representation of Blacks in the mainstream at all levels; in the tensions that still exist in various settings between Blacks and Whites; in the lower living and educational standards of Blacks; in the lack of opportunities for them; in their higher than average unemployment and incarceration rates; and in the general alienation Black people feel.

That is not to say there have not been improvements. All jurisdictions in Canada now legally protect Blacks and other visible minorities from discrimination in employment and other services. Section 15 of the *Canadian Charter of Rights and Freedoms* gives constitutional recognition to this equality of all Canadians, regardless of race. Human Rights Commissions investigate and adjudicate complaints from individuals who have been discriminated against. There are various models of "affirmative action" in place in some provinces to give Blacks and other minorities greater access to employment, services and certain professions.

Despite all of that, however, it is apparent to us that the problem has not disappeared. We have heard disturbing accounts of racial stereotyping and overt discrimination against Blacks. In our research, we have discovered that the population at large as well as the Black community believes there is discrimination against Blacks in all major institutional sectors of society, including the criminal justice system.

It is difficult, perhaps impossible, to measure the extent to which this perception is based on reality. But that, in our view, is not the issue. Nova Scotians must have confidence that the legal system is fair and unbiased. If a large segment of the population does not accept that proposition, then the system itself must accept some responsibility and must begin the process of change.

2.4.2 The research results

Our research on Blacks in Nova Scotia (see Volume 4), which included interviewing both Blacks and Whites, set out to measure how Black people are treated in the criminal justice system and to determine whether there were racial differences in sentencing.

What did we learn from our research? We have learned that Blacks are more likely to perceive that a "great deal" of discrimination exists than non-Blacks. When education, occupation, age and income are taken into account, however, we see similar patterns between Blacks and Whites. Those with higher levels of education and occupation are more likely to perceive a "great deal" of discrimination. Younger Blacks are most likely to believe discrimination is increasing, while older, non-Blacks are most likely to believe it is decreasing.

Both Blacks and Whites believe employment and housing are the main areas in which discrimination and prejudice exist. But Blacks also clearly believe there is significant discrimination in the criminal justice system as well.

A large portion of both Blacks and Whites believe the police are the most likely officials in the criminal justice system to practice discrimination. Young Blacks are especially likely to hold this view. The older age groups of both populations, but especially non-Blacks, are least likely to perceive differential treatment by the police.

Blacks are also likely to believe the courts discriminate against them. Interestingly, Blacks in the "higher" occupational categories are most likely to perceive discrimination by the courts. Non-Blacks, on the other hand, are most likely to say there is no difference in the way courts deal with those accused of crimes.

The most common explanation given by both Whites and Blacks for the belief that Blacks are treated less fairly by sections of the criminal justice system has to do with what they see as personal biases and prejudice of people in the system.

This brief description of some of the survey results indicates some trends, the most striking of which is the extent to which there is a widespread perception that discrimination exists.

When respondents were also asked which part of the justice system - police, the courts or the corrections system - would be most inclined to respond to community requests for change, the police were selected more often than any other part of the system. Respondents were less certain about the courts, and even less about the corrections system. (The uncertainty concerning the correctional system probably stems from the fact that it is the least familiar of the three systems.)

Interestingly, Blacks in both the "high" and "low" educational categories agreed that the first priority for changing the system is to get more Blacks in the system. They also urged, in descending order of priority, that there needed to be more professionalism and better training for police officers, more equity in hiring, and the hiring of younger, "fairer" individuals.

Non-Blacks, while they also exhibited a striking similarity across educational categories, emphasized more general recommendations - the need for more professionalism and better training of justice personnel, for example, followed closely by greater public awareness and education. Perhaps for good historical reason, Blacks were less confident that such general strategies for change could result in the sensitivity and empathy they believe the criminal justice system requires.

Although we agree with Black respondents that specific changes will be necessary to overcome problems of discrimination, we also share with non-Black respondents a recognition of the importance of education in eradicating racist behavior. The role of education, while outside the mandate of this Commission, must be given the attention it deserves by the proper authorities. This will hasten the demise of racist attitudes.

2.4.3 Framework for our Recommendations

Earlier in this Chapter we indicated that racism cannot be solved without a concerted political will to change. We recommended that the Province adopt a Policy on Race Relations that would articulate a commitment to reducing racial tensions, eliminating barriers to Black participation and increasing the representation of Blacks in the criminal justice system. In our view, this is an important and necessary acknowledgement that racism does exist, and a strong foundation for positive action.

The Nova Scotia Government's commitment and responsibility to eliminate inequalities based on race in all social, legal, economic and cultural policy areas, including the criminal justice system, must be very clearly stated. This policy must indicate that the Government bears responsibility for aggressive leadership in eliminating racial discrimination by both defining the goals of the policy and in enforcing it strictly. This will require a high visibility campaign among staff and the general public. As we pointed out, this policy should be implemented and monitored by the Human Rights Commission, which must also be given adequate resources to meet this challenge.

The Cabinet Committee on Race Relations, which we have also proposed, will provide a regular forum for the Black community to raise issues of concern that can become part of the Government policy planning agenda. This recommendation, as well as those dealing with representation of Blacks in and by the legal profession, should be effective not only in bringing Government to recognize its responsibility to eliminate racism within areas of its jurisdiction, but also in providing better services to Blacks in Nova Scotia.

The recommendations which follow seek to strengthen the mechanisms for change. We have tried to strike a balance between strategies that utilize public awareness and education as the tools of change and those which are more direct and more blunt - legislative changes and placing Blacks directly into positions of influence. Both strategies are important, and neither should be used to the exclusion of the other.

2.4.4 Strengthening the Human Rights Commission

The only legislation in Nova Scotia that specifically protects the rights of Blacks and other visible minorities is the Nova Scotia *Human Rights Act*. But this Act has not been as effective as it should be in minimizing the problems faced by Blacks. The Commission must be given the mandate and resources as well as the independence to enable it to do its job.

It is difficult to obtain information about the Human Rights Commission, since the Commission has not filed an annual report to Government since 1981. Although there is no requirement in the legislation for it to report annually, we believe the fact that this is not done at the initiative of the Commission itself is surprising and unfortunate.

We cannot easily find out, for example, the number of complaints that have come before the Commission, and the basis on which the complainants claim they were discriminated against. We cannot easily find out the proportion of those cases investigated that result in a Board of Inquiry being appointed, or whether the Commission is actively pursuing alleged cases of discriminatory treatment within Government.

If the public cannot easily get answers to such questions, much of the "public awareness" benefit of the Commission's work is lost. Making sure that the record of the activities of the Human Rights Commission is readily and easily available to the public is an important aspect of the role of the Commission. We believe the *Human Rights Act* should be changed to require the Commission to submit an annual report.

Does the Human Rights Commission's mandate include those parts of the justice system under provincial control? In our view any present uncertainty over this issue should be removed by legislative amendment.

Under the present provisions of the *Human Rights Act*, the Minister in charge of the Act has the power to decide whether to appoint a Board of Inquiry when the Commission has been unable to settle a complaint and has recommended that a Board be appointed. This discretionary power presents an opportunity for ministerial intervention in the dispute settlement process. We do not suggest such appointments have been denied for improper reasons but we believe the Commission - not the Government - should decide whether a Board of Inquiry should be appointed. This is especially obvious in cases where the Government might be the respondent in the action, or where the issue might be politically sensitive. Section 25 of the Act should be amended to remove ministerial discretion in appointing a Board of Inquiry.

The Commission's independence from the Government is crucial to its ability to handle complaints fairly and without fear of reprisals. We note that the degree of ministerial control over the Commission in Nova Scotia's Act is significantly greater than that provided the Federal Government under the *Canadian Human Rights Act*.

Under the Nova Scotia Act, the Commission is responsible to the Minister for the administration of the Act (Section 17) and must present its budget through the Minister (Section 22). The Minister also makes individual appointments to Boards of Inquiry (Section 25).

By contrast, under the Canadian Act, the Commission is a quasi-independent body that has no responsibility to an individual Minister other than through its annual report (Section 61). It is solely responsible for the adjudication process, including appointing tribunals through a process by which an independent person chooses individual appointees from a list drawn up by the Governor in Council (Section 49).

We favour the federal model because it provides the Commission with the necessary separation from Government to enable it to push for changes and policies in support of human rights, which might not be part of the Government's agenda. If the role of the Commission is to promote human rights in the province - within the Government as well as in the private sector - it must be given the flexibility and independence to do so.

We believe creation of a specialized Race Relations Division within the Commission, reporting through the Race Relations Commissioner, will also give a strong focus to issues of race and racism within the Commission. There are many concerns raised by individuals or groups that may never reach the status of a "complaint", but which should be dealt with seriously, sensitively and quickly in order to avoid further racial tension. The Race Relations Division can be active in approaching communities, pressing for policy change where necessary and keeping abreast of problem areas and dealing with them expeditiously. This should be a high profile, properly funded aspect of the Commission's work.

Recommendation 31

We recommend that the Nova Scotia Human Rights Act *be amended:*

(a) *to require that an annual report of the Commission's activities be submitted to the Minister who shall place the report before the Legislative Assembly;*

(b) *to specifically state that those parts of the justice system under provincial jurisdiction are included in the Act's coverage;*

(c) *to provide that where the Commission is unable to settle a complaint, and where the Commission recommends the appointment of a Board, it shall report to the Minister who shall appoint a Board*

of Inquiry (Section 25 now gives the Minister a discretion as to whether a Board should be appointed); and
(d) *to establish within the Commission a Race Relations Division reporting to the Commission through one or more members, at least one of whom shall be full time and designated as Race Relations Commissioner.*

It is important that the Commission have the ability to obtain independent legal advice. At present, the Commission uses the services of a staff solicitor at the Attorney General's Department. Without suggesting that the Commission has been badly served, we feel the potential for conflict of interest is great. If an individual complains against a Department of Government, for example, both parties - the complainant and the respondent - would be represented by counsel for the Attorney General's Department. This is improper and should be rectified immediately.

While these changes in procedure are important to ensure that the process for dealing with human rights complaints is fair and unbiased, we recognize there are other serious matters concerning the handling of race relations within the Commission that must be addressed. Our recommendations suggest a much stronger role and a much more active stance by the Human Rights Commission.

In monitoring the implementation of the Policy on Race Relations that we recommended earlier, the Commission must be prepared to enforce recruitment and hiring quotas aggressively, and to take appropriate action when the policy has been breached. We also suggest the public education function of the Commission be enhanced by giving it the resources to pursue more actively its public awareness and education function. At present, the Commission has only one Public Education Officer for the province. This service should be greatly expanded.

Recommendation 32

We recommend that the Human Rights Commission be provided with sufficient resources to enable it to effectively carry out its present mandate and further responsibilities added by our recommendations, and in particular to enable it:
(a) *to retain independent legal counsel; and*
(b) *to engage in an active public awareness program, particularly in the area of Native and Black concerns.*

2.4.5 Courts

As we pointed out earlier, our research indicates a widespread perception of discrimination against Blacks in the criminal justice system. We heard suggestions at the public hearings and at the Consultative Conference that stereotyped attitudes about Blacks are a factor in the way they are treated by the courts, whether as accused or victims.

Close to 50 percent of Blacks and 33 percent of non-Blacks in our survey believe Blacks are treated less fairly in the courts than non-Blacks. This is cause for great concern.

The most public arena in which justice is dispensed is the courtroom. This is where the judicial system is on public display. For that reason, we believe judges and lawyers in the court system must recognize their special responsibility to deal fairly with everyone who comes before them or whom they represent, regardless of race or background.

Judges especially must play an active role within the court system to ensure that prejudicial treatment - in language, in sentencing, in policies and procedures - does not occur. If it does, the judge must make sure it is condemned. If the courts condone differential treatment of racial minorities, the integrity of the entire system will suffer. Chief Judges must take a strong leadership role within their courts, and with those appearing in or working in their courts, to ensure that such behavior is not tolerated.

Recommendation 33

We recommend that the Chief Justices and the Chief Judges of each court in Nova Scotia exercise leadership within his or her area of responsibility to ensure fair treatment of visible minorities in the criminal justice system.

2.4.6 Sentencing

One of the most disturbing allegations we have heard is that there is disparity in sentencing between Black and non-Black offenders based on race. If these allegations were true, it would be clear evidence that there is discriminatory treatment and strong immediate action would be required. Because of the seriousness of these allegations, we undertook a study to test the proposition that sentence disparity on racial grounds exists in Nova Scotia.

This study (Volume 4, Appendix 4) examined cases involving 51 Blacks and 126 non-Blacks convicted of theft under Section 294 [now Section 334] of the *Criminal Code*. Although the study indicated that Blacks were less likely to obtain discharges and more likely to be incarcerated than non-Blacks, the study also found that race was not a significant factor in these sentencing decisions.

We were uncomfortable with the results of this research because of the small sample size and other factors. We therefore commissioned another study to see if the results of the first study were reliable. The second sentencing study looked at cases involving 221 males (22 percent of them Black) convicted of assault in 1987-88 in the Halifax-Dartmouth area. (Volume 4, Appendix 5) The sentencing patterns in the "assault" study are consistent with the results of the 'theft' study; neither provides much basis for the belief that race is a significant factor in sentencing.

While Blacks were more likely to be incarcerated for assault than non-Blacks, the relationship between sentence severity and race was not statistically significant, and became even less so when other factors were taken into account, such as prior convictions, the number of related prior convictions, the extent of injury suffered by the victim, or whether other charges had been laid against the offender.

It is true that more Blacks were incarcerated than non-Blacks, that none of them received a discharge, that Blacks received longer sentences and that Blacks assaulting non-Blacks were sentenced more harshly than Blacks assaulting Blacks. But all of the statistical analyses of this data suggests that the distinctions were made on grounds other than race. Professor Clairmont, the author of the "assault" study, has drawn the following conclusion from the research:

Volume 4, Appendix 5, Page 185

> In sum, this research has shown that the race impact on sentencing either directly or indirectly is quite weak. ... More attention has to be given to the laying of the charges itself, stays of prosecution, discharges overall and implicit understandings and expectations of Blacks, lawyers and court officials. Racism in a system of formal rationality cannot but be subtle and cumulative. Statistical analyses of the sort done here may be too blunt a tool to capture this well. ... Sensitivity to the legacy of racism and appreciation of its modern guises was not evident in the court dockets nor in the special acts of leniency encountered (e.g., discharges). Such sensitivity in conjunction with a concern for more equitable legal resources and socio-economic opportunities would seem to be required to truly eradicate racism and discrimination. As long as the persons making and interpreting rules and administrative policies are drawn from narrow class and race/ethnic backgrounds the sensitivity and change might be hard to come by.

Despite the fact that neither of the two sentencing studies has concluded that differential sentencing based on race exists in Nova Scotia, that does not change the perception among Blacks that there is significant racial discrimination in sentencing.

We believe this indicates a lack of confidence among Blacks in the fairness of our court system and reinforces the urgent need for implementation of some of our other recommendations, which are designed to increase confidence by encouraging the hiring of more Blacks in the criminal justice system and by educating non-Black officials to the needs and concerns of Blacks and visible minorities.

Although the sentencing research did not indicate racial favoritism in sentencing, it did bring to our attention a number of other disturbing facts. According to the research, Blacks were less likely than non-Blacks to retain private counsel, to plead not guilty and to have favorable pre-sentence reports - all factors which are influential in obtaining more lenient sentences.

Because of the importance of counsel in sentencing, and the significant proportion of Blacks and minority offenders using legal aid counsel, we believe the legal aid service must be given sufficient resources to meet the need.

Recommendation 34

We recommend that, because of the dependence of Black clients on legal aid services, the funding of legal aid in Nova Scotia be re-examined to ensure that there are sufficient counsel to properly serve minority clients and to engage in proactive programs in minority communities.

The relationship between Blacks and various municipal and RCMP police forces clearly requires comment as well. We deal with this aspect of Blacks in the criminal justice system in more detail in our chapter on Police and Policing (Chapter 2.6).

2.4.7 Conclusions

The recommendations we have made to improve the treatment of Natives and Blacks in the criminal justice system have focussed on specific policies and legislation, as well as education and training. Such initiatives will be doomed to failure, however, without regular and effective monitoring. We have not proposed a separate body be established with responsibility for overseeing implementation of these recommendations. Instead, we suggest that Government, judges, lawyers, the police and others ultimately be responsible for their own area of jurisdiction.

It is easy to blame Governments for all that we might identify as "wrong" in our society, and we have attempted to avoid this temptation. Government, however, must accept that it has a special duty in these matters. As legislator and employer, the role and influence of Government in this province cannot be underestimated.

These recommendations provide a rare opportunity for everyone involved in the system - not only Government - to change patterns of behavior and policies that have been well entrenched but never questioned, and to open doors that have remained closed for much too long to the full participation of minorities.

2.5
Administration of Criminal Justice

We have found that Donald Marshall, Jr. was wrongfully convicted of murder and deprived of his freedom for 11 years because the justice system broke down. Each component of the system - every check and balance - failed. The Sydney City Police, Crown prosecutors, defence counsel, the courts, the Department of Attorney General and the RCMP all contributed to Marshall's conviction and continued imprisonment by failing to perform to an acceptable standard. In the months that followed Marshall's eventual release and acquittal, there were accusations that racism played a role in Marshall's conviction and that, if he had been White, the process by which he was acquitted and his struggle for compensation may have been handled differently.

If there are differing standards of justice in Nova Scotia, depending on one's race or social standing, it suggests internal control within the system has broken down. It also suggests that the major components of the system are not fulfilling their proper functions and the appropriate interrelationships are not understood or observed.

The Commission found that the fact that Marshall was an Indian contributed to his 1971 conviction. To determine whether the system of justice itself differentiated among individuals based on race or social standing, the Commission, through its research, reviewed Department of Attorney General files. This review focussed on the manner in which certain cases were handled by the Department and then compared them to the handling of the Marshall case. In order to assess the overall functioning of and interrelationships among the major components of the justice system, specific research projects were conducted on the role of police, Crown prosecutors, the Office of the Attorney General, and Natives and Blacks and the criminal justice system.

This approach was outlined by the Chairman in his statement at the opening of the public hearings on September 9, 1987:

Transcript, Page 3

> In order to develop meaningful recommendations, all contributing factors must be carefully and critically examined in the context of the current state of administration of justice in Nova Scotia. As I indicated in my Opening Statement at the Hearings held in May to consider the matter of funding, we will also examine, among other things, the role of the Attorney General as a member of Cabinet, the relationship of Crown prosecutors with defense counsel and with the police, as well as related matters. In addition, I advised that we intend to give consideration to the allegation that minorities of this Province are not treated equitably by the justice system. It is our ultimate aim to make recommendations which will ensure that the unfortunate events surrounding Mr. Marshall will not be repeated; to do this we must satisfy ourselves that the present state of the administration of criminal justice in Nova Scotia is sound. We will not avoid a discussion of these issues.

What follows is the result of an examination of the criminal justice system. The conclusion we have reached is that the system does not work fairly or equally. Justice is not blind to color or status. There is a widespread lack of understanding within the system of the appropriate roles of the Attorney General, the prosecutor and the police. And there is a lack of structural control and organizational independence which has made it easier for unchecked and inappropriate decisions to be made.

A properly functioning criminal justice system is the bedrock on which society's acceptance of our system of law and the maintenance of order is based. But because of what has happened in the Marshall case and some others we will examine now, many people in Nova Scotia have begun to question the fairness and independence of the province's justice system. This erosion of confidence must be stopped and public confidence restored. This can only be accomplished through the unwavering and visible application of the principles of absolute fairness and independence.

2.5.1 Examination of particular cases

This Royal Commission was established to find out what went wrong in the Donald Marshall, Jr. case, and to make recommendations to ensure that such a miscarriage of justice could not happen again. From the outset, however, we realized we would need to consider more than just this one case if we were to properly discharge our mandate. We had to consider the Marshall case in context. Was the justice system's handling of it an aberration? Would the system have responded differently if Marshall had been White - or if he had come from an affluent background, or if he had been a powerful public figure - instead of a poor Native?

At a very early stage, this Commission heard allegations that the criminal justice system dealt with people differently based on their race and social standing. In particular, we heard that politicians or others with influence were given preferential treatment by the justice system.

We decided it would be appropriate to examine how the justice system functioned in cases involving those who might be considered to have power and influence, and compare their treatment with that given Donald Marshall, Jr.

To assist the Commission in fulfilling this aspect of its mandate, we examined certain files in the Department of Attorney General. Eventually, we decided to focus our attention on two specific cases involving members of the Nova Scotia Government - Roland Thornhill and Billy Joe MacLean - who had been the subjects of police investigations, which investigations were already in the public domain. We decided that the most appropriate way to deal with these cases was through testimony at public hearings.

It is important to make the point that the purpose of our examination of these two cases was not - and is not - to question the merits of the decision not to prosecute in the case of Thornhill, or the merits of the final disposition of the MacLean case. The Commission did not consider the guilt or innocence of the individuals concerned, but only how the justice system responded to these cases and what factors influenced the various decisions that were taken.

2.5.2 The Thornhill investigation

This investigation arose as a result of a compromise financial settlement the Honorable Roland Thornhill reached with four Canadian chartered banks to settle outstanding indebtedness he had accumulated over a number of years prior to becoming a member of Government.

On September 17, 1979, Thornhill, who had been Minister of Development in the Provincial Government since October 5, 1978, put forward a proposal to the banks through his accountant. He would agree to pay 25 percent of the amount he owed to each of the banks, provided they all accepted the terms and forgave any accrued interest. In view of Thornhill's critical financial situation this proposal should not be considered extraordinary or unreasonable. Between September 21 and November 5, 1979, all of the banks accepted this proposal. (Exhibit 164)

After hearing rumors and other information in early 1980, the RCMP carried out some preliminary inquiries concerning this settlement agreement. They decided on the basis of those inquiries that no investigation was warranted. They reached that conclusion based on their interpretation of Section 110(1)(c) [now Section 121(1)(c)] of the *Criminal Code*, which states:

> Every one commits an offence who
> (c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealing with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through anyone for his benefit, unless he has the consent in writing of the head of the branch of governmment that employs him or of which he is an official, the proof of which lies upon him.

The RCMP officers involved appear to have concluded that they could not determine if an offence had been committed because they did not know whether Thornhill was a member of Government at the time of the settlement. (Exhibit 165, Page 8) They could have found that out, of course, by simply checking back copies of the newspaper or calling the Executive Council office. Their disinterest or hesitancy in finding out this information does not reflect the standard of professional police work expected of the RCMP, and it causes us some concern.

In February 1980, the RCMP briefed the then Attorney General, the Honourable Harry How, and the then Deputy Attorney General, Gordon Coles, regarding the Thornhill situation. They told How and Coles they believed no investigation was warranted. Based on what he had been advised at this meeting, How told the legislature on March 7, 1980, that the RCMP was not conducting an investigation in relation to any Government official, the Provincial Government or any other Government agency.

Four days later, following a further meeting with How and Coles, the RCMP issued a press release - prepared with Coles' participation (Exhibit 165, Page 4) - confirming what the Attorney General told the House, and publicly declaring that the RCMP's inquiries into the Thornhill matter "did not warrant the commencement of an investigation."

We believe it was inappropriate for the RCMP to cooperate with the Deputy Attorney General to issue a press release to support a position taken by the Attorney General. As we have noted, the RCMP investigation had not been thorough and complete. Moreover, this cooperation between the Deputy Attorney General and the RCMP leaves the impression that their joint purpose was to manage public opinion and minimize the political damage that would result from a provincial cabinet minister being the possible subject of an RCMP investigation. Roland Thornhill had no knowledge of nor any involvement in any of this.

2.5.3 RCMP investigation

On April 10, 1980, a month after the RCMP press release and following further discussion of the matter in the House of Assembly, Chief Superintendent Hugh Feagan, Commanding Officer of 'H' Division, advised Gordon Gale, the Director (Criminal), that the RCMP "would be proceeding with an investigation to which he [Gale] agreed."

On April 18, 1980, a news article entitled "RCMP Seeking Documentation" reported that Attorney General How:

Exhibit 169

> ... told reporters later he is convinced Thornhill did nothing improper in the settlement with the banks and he hopes the minister will stay in his job for a 'long time to come.'
>
> He said the matter of the minister keeping his portfolio during the investigation would be up to the premier to decide. Mr. How said his department is letting the RCMP conduct the investigation. 'We are not going to be seen as exercising any political interference with what they do.'

How testified before us that he did not intend to prejudge the outcome of the RCMP investigation. Nonetheless, How's statement is a very strong pre-judgment of the propriety of Thornhill's settlement with the banks. Such a statement conveys a very clear signal of the Attorney General's attitude toward the situation. Whatever the actual effect of How's statement may have been on the outcome, it was improper for him to comment on the merits of the case before the RCMP even completed its investigation. Quite aside from anything else, the perception generated by a statement of this sort does nothing to enhance public confidence in the impartiality of the exercise of the Attorney General's prosecutorial discretion. If charges were subsequently laid, such comments might prejudice the Crown's case or make it difficult for Thornhill to get a fair trial.

The principal RCMP investigator was Corporal Cyril House of the Commercial Crime Section. He filed his first preliminary report on May 7, 1980.

Exhibit 164, Page 2

> ... there is sufficient evidence on hand to establish a prima facie case under section 110(1)(c) C.C. Consideration is now being given as to whether or not there is sufficient evidence to substantiate an offence by the banks or its officers. Offences that are being considered are sec. 110(1)(b) C.C. or Conspiracy, sec. 423 C.C.

This and all subsequent RCMP reports were forwarded to Gordon Gale's attention.

The normal practice in Nova Scotia is that investigating RCMP officers can ask for the advice and assistance of Crown prosecutors during the course of their investigations. Generally speaking, the RCMP officers initiate such a request. This sort of advice-seeking and collaboration is very common from the early stages of a commercial crime investigation.

In this case, after the RCMP requested access to a Crown prosecutor, David Thomas, the Chief Prosecuting Officer for Halifax County, assigned Kevin Burke to assist House. At the time, Burke was one of two or three Crown prosecutors working almost exclusively on commercial crime matters. (Transcript, Page 14878) Burke had been working in this area for a period of time and had acquired some expertise although, as Thomas testified, "I don't think any of us were experts in anything". (Transcript, Page 14877)

In July 1980, however, Gordon Coles issued a directive ordering that House was to have no further contact with Burke or any other local Crown prosecutor. Gale wrote to Superintendent Feagan to convey the Deputy Attorney General's instructions in the following terms:

Exhibit 165, Page 18

> ... that no charges were to be laid nor was any contact to be made with prosecutors concerning this matter until you had finished your investigation and forwarded a report to this Department so that the matter could then be examined and the Attorney General fully apprised of the evidence. Your investigators are to cease to have contact with the Prosecutors concerning this investigation and to concentrate on getting their long awaited report in to the Department summarizing the evidence and the charges proposed based on the evidence so that it can be reviewed and then forwarded for prosecution if the evidence supports charges.

Neither Coles nor Gale nor any other senior departmental official passed this directive on to Thomas or Burke. Despite this departure from the normal RCMP practice, the RCMP itself raised no formal objection to this instruction.

The Deputy Attorney General's prohibition against further contact with prosecutors was an unwarranted departure from normal practice. This issue subsequently became the subject of a press release Coles issued from Victoria, British Columbia, on November 6, 1980. It stated that the procedures followed in the Thornhill case, as they related to the use of Crown prosecutors by RCMP investigators, were in accordance with accepted well-known and understood practice and policy. A "clarifying" press release was later issued from Halifax, after David Thomas threatened to publicly contradict Coles' misleading statements in the first release. Despite what Coles' press release claimed, all of the Crown prosecutors and RCMP personnel who testified before this Commission stated that the decision to bar RCMP officers from having access to Crown prosecutors during their investigation was not in accordance with understood practice and policy, and we find that there was no such practice or policy.

On August 29, 1980, House submitted his final report, which was subsequently forwarded to Gale's attention on September 11, 1980. The RCMP report concluded that a *prima facie* case of a violation of Section 110(1)(c) of the *Criminal Code* had been established against Thornhill. The RCMP requested a Crown prosecutor be appointed so it could obtain advice regarding existing and additional evidence, questions of law and court procedures.

At this stage, the RCMP had effectively completed its investigation of the Thornhill matter, subject to any request from the Crown to obtain additional evidence. Such a request never came. There was no further communication between the RCMP and the Department regarding the case prior to a public announcement on October 29, 1980 when Attorney General How stated there had been no criminal wrongdoing on the part of either the chartered banks or Thornhill.

Attorney General How testified before the Commission that he wished to distance himself as much as possible from the handling of this case. He was sensitive to the fact that, since Thornhill was a Cabinet colleague, there must be independence and the appearance of independence in the handling of the prosecutorial decisions. He therefore instructed his Deputy, Coles, to have an opinion and recommendation prepared for him, which he indicated he would accept. He testified he did not expect to apply his own independent judgment to the issue but would simply accept Coles' opinion:

Transcript, Page 15103

> A. I said to him, in essence, 'You make that in the form, yes, of a recommendation', because under the system I ultimately, as Attorney General, had to make the determination or make the decision to ... whether or not prosecution would be proceeded with, but you make it, you tell me what you think ought to be done, whether Mr. Thornhill ought to be prosecuted or not. I will accept that as binding on me and I will follow it.

The evidence is clear that Coles took charge of the Thornhill investigation and managed it within the Department of Attorney General. He handled the matter personally within the Department and made sure there was no communication between the lower echelons of the RCMP and the prosecution service. Coles himself had no contact with the RCMP prior to formulating his opinion and recommendations for the Attorney General.

Although the rationale for having senior officials in the Department deal with the case instead of local prosecutors was to ensure that the case would be considered by senior lawyers experienced in criminal law, the actual involvement of any other departmental lawyers was very limited.

Director (Civil) Martin Herschorn prepared a memorandum for Coles' assistance, which simply discussed a chronology of the negotiations between Thornhill and the banks, and reviewed indications contained in bank documentation regarding the position of the banks with respect to collection of the account. Director (Criminal) Gordon Gale testified that he attended one meeting with Coles and Herschorn at which there were "general discussions" of the case. (Transcript, Page 15294)

Despite Coles' acknowledged lack of expertise in criminal law, he neither sought nor obtained any memorandum of law, any case analysis or other material from Herschorn, Gale or any other officers of his Department.

In our view, while Coles, as the permanent head of the Department, had the right and ultimate authority to take charge of this case, it was inappropriate for him to do so. The sensitive nature of the case demanded that normal procedures be followed. Even if it was appropriate for the matter to be reviewed in the higher echelons of the Department, however, such a review should have been conducted by the most experienced criminal lawyers in the Department - Herschorn or one of his staff, for example - and then subject to further review by Gale and other experienced criminal lawyers.

Martin Herschorn testified about the factors that would influence the involvement of the Deputy Attorney General in any particular case:

Transcript, Page 14961

A. Generally, I suppose the profile that a particular case has gathered may warrant the personal involvement of the Deputy Attorney General in an assessment of the matter.

Q. Let's just stop with that. Why would the profile warrant the individual attention of the Deputy to the exclusion of local Crowns?

A. Because if a case is of a particular magnitude and if the decision, as in the particular facts of this case, could involve the future career of a politician, I have no difficulty with the personal involvement of the Deputy Attorney General in assessing that situation.

Q. But surely any criminal investigation involves the future career of the person they investigate.

A. Yes, and often the Deputy Attorney General or myself in my position or the Director of Criminal may become involved in assessments of cases that are ... would otherwise perhaps be dealt with by a county prosecutor.

Q. Because of the concern about the career of the person being investigated.

A. That may be one factor. Each case, I would stress, has to be considered on its own merits.

Q. If the effect on the person being investigated, the effect on their career is to be considered, do I understand that that is then more of a policy or discretionary consideration rather than anything to do with the facts or the law?

A. Yes, I think that falls within the ... what the academic community would characterize as prosecutorial discretion.

Q. And is it your evidence then that you do not think it inappropriate that where there is a politician being investigated that the Deputy should involve himself personally?

A. I don't, I don't characterize that as inappropriate, no.

Q. Not inappropriate?

A. No.

Q. Why? What are the interests that the Deputy is trying to protect?

A. I reject the implication in your question that he's trying to protect anything. He is the ... in practical terms, because the Attorney General is not involved in day-to-day administration matters, he is the most senior available, for want of a better term, Crown attorney, and if he chooses to inject himself into a situation, I have no difficulty with that. He's responsible, to use common parlance, the buck stops on his desk, and if he chooses to involve himself, that's entirely appropriate.

Q. But what is it about the career of a politician that makes it appropriate for the Deputy to involve ...

A. I can't comment on the specifics of this. You'll have to direct ... that type or question to Mr. Coles.

Q. No, I wasn't asking about specifics, but you had indicated that if it involved the career of a politician, it would not be inappropriate for ...

A. That could be one factor, yes.

Q. All I'm asking is what is so ...

A. Or the career of any individual.

Q. Well surely, any accused has a career or at least a potential career ...

A. That's ... I acknowledge ...

Q. You're not telling me ... you're not telling me that the Deputy is going to involve himself in every case.

A. No, I'm not, nor do I.

Q. What's so different about the career of a politician?

A. The matter has an obvious high profile.

Q. Yes.

A. And I think given that profile, it is not inappropriate, should he so desire, for a Deputy Attorney General to [involve] himself in such a situation.

Q. To involve himself to the exclusion of normal processes, the review by local Crowns or further dialogue ...

A. If that's his determination, he has the responsibility and the accountability for such decision.

Both Herschorn and Gale testified that they did only exactly what they were asked to do in the Thornhill investigation, no more and no less. Both testified they did not exercise any independent initiative and did not offer any unsolicited opinions on any aspect of the case. While recognizing Coles' authority to act as he did, we find it disturbing that Gale and Herschorn did not appear to feel comfortable in offering their professional opinions on how this case should be dealt with. Gale testified he "didn't consider him [Coles] an expert in criminal law" (Transcript, Page 15302), but added that "if he [Coles] wanted advice, he would ask for it". (Transcript, Page 15303)

Coles did not ask for advice, but he did prepare a legal opinion for the Attorney General that supported his argument that there was not sufficient evidence to lay criminal charges. Coles opinion was as follows, as expressed in a memo to Attorney General How dated October 23, 1980:

Exhibit 165, Page 31

1.

The above captioned report, addressed to the Deputy Attorney General, was delivered to the Director (Criminal) of the Department on September 11th last. The report and attachments are lengthy and detailed and the attachments to the report include copies of loan applications, financial statements, bank records and correspondence pertaining to Mr. Thornhill's financial affairs with the Chartered Banks, X, his former employers, other financial institutions and other persons with whom he has had financial dealings over a period from the early 1970's to and including September/October 1979, when the Chartered Banks accepted the latest proposal made on behalf of Mr. Thornhill for the settlement of his indebtedness with them.

2.
The foregoing report and attachments have been fully considered by the Director (Criminal), Assistant Director (Criminal) of the Department, and the writer, to determine whether the nature of the financial dealings by the said Banks, with Mr. Thornhill, and in particular whether the settlement of Mr. Thornhill's indebtedness with the Banks constituted an offence on the part of the Chartered Banks, or on the part of Mr. Thornhill, contrary to the provisions of Section 110 of the *Criminal Code*.

3.
Attached, for your ready reference, is a xerox of the relevant provisions of Section 110(1) of the *Criminal Code* which sets out the offences which constitute frauds upon the government. The investigation by the RCMP was to ascertain the facts to determine whether the Chartered Banks, in their dealings with Mr. Thornhill, had committed any offence under Section 110(1)(a)(i) or (b) of the *Criminal Code* and whether Mr. Thornhill had committed any offence under Section 110(1)(a)(ii) or (c) in offering to settle his indebtedness on the basis proposed on his behalf.

4.
During the period under investigation Mr. Thornhill had extensive dealings with the said Chartered Banks which involved obtaining loans for personal and investment purposes and refinancing past indebtedness. The history of these loan accounts indicates that they originated as borrowing accounts or demand loans not requiring repayment within a fixed term. Although the Banks expressed concern with the status of these accounts, it was in February and March of 1977 when the Banks expressed serious concern for the lack of security for the loans and the financial ability of Mr. Thornhill to repay the indebtedness and made demands that he do so.

5.
The report details the principal sums loaned or advanced and the interest charged against these loans, which appeared at all times to be either at the prime rate or prime plus rate.

6.
The report also particularizes:
(i) the payments made by Mr. Thornhill;
(ii) the application of proceeds realized on the sale of hypothecated shares;
(iii) the application of the proceeds from the sale of a cottage property.

7.
Copies of the correspondence attached to the report indicate that during the years 1977, 78 and 79 the Banks requested security for the outstanding balance of their loans and increased their demands that the balance outstanding be paid. Mr. Thornhill consulted a senior member of a prominent firm of Chartered Accountants concerning his financial affairs and the Chartered Accountant held several meetings with representatives of the Banks and others in an effort to settle the Banks' demands and those of other unsecured creditors. Discussions among them resulted in different proposals being considered providing for the repayment of the outstanding loan indebtedness. These proposals did not conclude in any agreement since they involved making financial arrangements and the providing of security which Mr. Thornhill was unable to accomplish.

8.
The position concluded by two of the Chartered Banks can be summarized from their internal memoranda of March 1978 between their local branch managers and regional bank officers as follows:

- Notwithstanding the demands and proposals discussed, apart from the application of the sale of hypothecated securities, and the proceeds from the sale of the cottage property, balances of the loans remained outstanding.

- Mr. Thornhill's overall financial position indicated no prospect of his being able to pay off the indebtedness.
- Although bankruptcy proceedings were considered by one Bank, it was concluded that such proceedings would jeopardize his source of income, it being the only source to which they could look for payment in respect to their unsecured position.

The position reached by the said two Banks is best stated by quoting from their own internal memoranda:

'...we agree with your decision to write off this account as distasteful as it is and we would appreciate your forwarding a bad and doubtful debt report containing your recommendation...'.

'...we have little alternative at this juncture but to recommend a full write off...'.

'...we agree Mr. Thornhill's overall financial position is hopeless for all practical purposes, and in the circumstances, are supporting the recommendations made...'.

9.

Mr. Thornhill, through the accommodation of X, arranged to borrow limited funds enabling him to offer to pay each of the Banks twenty-five percent of the balance due each of them as payment in full for all outstanding indebtedness, as well as to settle the claim of the other pressing creditor. This proposal of settlement was set out in a letter of September 17, 1979, addressed separately to each of the Banks by the Chartered Accountant assisting Mr. Thornhill in these matters.

X accepted the proposed compromise settlement by letter dated September 21, 1979; X accepted the proposed compromise settlement by letter dated September 26, 1979 'providing other creditors are in agreement'; X accepted the proposed compromise settlement by letter dated October 16, 1979 'providing, of course, that all other Banks do likewise'. X, by letter dated October 4, 1979, replied to the proposed compromise settlement 'before we can give consideration to the proposal put forth we require a current statement on Mr. Thornhill including his present salary'. Subsequently, on November 5, 1979, X accepted the offer of settlement on the basis that 'our acceptance is provided subject to a similar proposal being agreed to by the other three Banks involved and on the understanding that the settlement will be received by December 15, 1979'.

10.

The *crux* of the matter is to determine whether there is evidence of the *necessary criminal intent* to characterize the settlement proposed on behalf of Mr. Thornhill and accepted by the Banks as constituting a fraud upon the government.

For a person, including a corporation, to be guilty of committing an offence under the provisions of Section 110 of the *Criminal Code*, involves the presence of a guilty or wrongful purpose or as was said by Mr. Justice Ritchie of the Supreme Court of Canada in *Regina* v. *Cooper*, in considering Section 110(1)(b) '...the offence created by that Section is in a real sense a criminal offence of which 'intention' to confer the benefits 'with respect to' dealings with the government is a necessary ingredient'. In the absence of such an 'intention', there is no offence.

Unless, therefore, the agreement reached between Mr. Thornhill and each of the Chartered Banks effecting a settlement of his indebtedness was made by the Banks *with an intention* of conferring an advantage or benefit on Mr. Thornhill 'as consideration for cooperation, assistance, exercise of influence... in connection with...business...relating to the government'; or, to 'confer an advantage or benefit (on Mr. Thornhill)...with respect to' dealings with the government, the Banks are not guilty of committing any offence under Section 110 since the necessary ingredient of 'intention' would be absent.

Similarly, for Mr. Thornhill to be guilty of any offence under Section 110, the offer made on his behalf to settle his indebtedness with the Banks must evidence a *criminal intention* to either accept or offer to accept an advantage or benefit from the four Banks 'as consideration for cooperation, assistance, exercise of influence...in connection with...any matter of business relating to the government'; or with a guilty mind 'demand or accept... from a person who has dealings with the government...an advantage or benefit...'.

11.
In determining the *intention* of Mr. Thornhill and the four Chartered Banks in concluding an agreement providing for the settlement of Mr. Thornhill's indebtedness with the Banks, the attachments to the police report evidence the following:

- A history of continued efforts by the Banks to effect collection, to realize on security held by and available to them, demands for repayment or satisfactory arrangements providing security for the outstanding indebtedness and its repayment.
- During the period from early 1977, 1978, until September/October 1979, protracted discussions were held by representatives of the Chartered Banks and a Chartered Accountant acting on behalf of Mr. Thornhill. Notwithstanding such discussions and various proposals considered, no agreement for the payment of the remaining outstanding balances due the Banks was reached.
- On or about March 1978, two of the Chartered Banks concluded that Mr. Thornhill's financial position was such that they saw no prospect of him satisfying his indebtedness to them and, accordingly, consideration was being given to writing the account off as a bad debt.
- The settlement of the indebtedness was initiated by the Chartered Accountant acting of behalf of Mr. Thornhill, in a letter written to each of the Banks on September 17, 1979. The offer was proposed based on the ability of Mr. Thornhill to arrange limited borrowings through the accommodation of X and represented a source of funds not otherwise available to the Banks. The money to be borrowed by Mr. Thornhill was available to him for the purpose of satisfying his indebtedness with the four Banks and another unsecured creditor and was limited to an amount which enabled the offer to be made on his behalf to settle his indebtedness with the Banks on the basis of twenty-five percent of the balances then remaining outstanding. As noted above, the offer was accepted by the Banks.
- The settlement proposed on behalf of Mr. Thornhill offered the Banks more than what two of them had expectations of receiving since, unknown to Mr. Thornhill, they had considered writing off the balances due them as bad debts. Therefore, the proposed settlement was a better offer than alternative prospects. The investigation discloses no evidence that the Banks, in accepting the settlement proposed, did so in respect to 'dealings with the government' or for consideration other than to settle the unsecured balances due them on the best available terms, having regard to Mr. Thornhill's financial position.

Upon considering the report and attachments provided by the RCMP investigation, I am of the opinion that the protracted discussions, the nature of the settlement, and the circumstances under which the offer was made on behalf of Mr. Thornhill and accepted by the Banks, do not disclose evidence of the kind of *intention* necessary to constitute any criminal wrongdoing on the part of either the Chartered Banks or Mr. Thornhill.

Being of the opinion that the investigation does not reveal evidence to establish the *essential ingredient of intention*, which is a fundamental element of the offence, it is not necessary to consider the other elements of the provisions of Section 110 which would otherwise need to be considered to determine whether the evidence supports a prima facie case.

Accordingly, in my considered opinion, there is not evidence to warrant the laying of any charges against the Chartered Banks, X or Mr. Roland J. Thornhill, in the captioned matter.

By any standard, Coles' opinion was woefully inadequate. It addressed Section 110 of the *Criminal Code* as if it were an integrated offence rather than three separate offences, each with different elements and requirements for proof of "intent". Most criminal offences require that "intent" be established in order to gain a conviction. A person charged with murder cannot normally be convicted, for example, unless the Crown establishes that the accused intended to kill the victim. If the killing was unintentional, the accused might be convicted of manslaughter instead.

Under Section 110(1)(c), however, the Crown does not have to prove that the accused *intended* to receive a benefit. The Crown must establish only that a benefit was, in fact, received, that the accused was aware of it and knew that the person from whom the benefit was received had dealings with the Government.

Coles' opinion is plainly wrong. The decided cases simply do not support his conclusion. Cases decided by the Nova Scotia courts - with which the Department of Attorney General would have been familiar - all support the view that intent is not required.

In addition to being wrong on the question of intent, Coles' opinion did not even address whether or not Thornhill had to have received a benefit, that being another of the elements necessary to constitute the offence. In simply not dealing with the question of benefit Coles failed in his responsibility as Deputy Attorney General.

The RCMP, in fact, wrote to Coles and referred to two Nova Scotia decisions that detailed the elements required to support a conviction under Section 110. Those decisions flatly contradict the opinion Coles prepared for the Attorney General. Despite that, Coles advised the RCMP - and later, this Commission - that he was fully aware of the Nova Scotia cases, and had considered them when preparing his opinion. If he did, then we must conclude Coles misled his Minister by claiming Thornhill did not have the required "guilty mind". Coles should have known that any objective review of the relevant Nova Scotia cases would not support his opinion. Coles also knew that the Attorney General had already indicated that he would accept his opinion without question.

Coles' opinion also gives the clear impression that the two most senior criminal lawyers in the Department, Gale and Herschorn, fully considered and supported Coles' opinion, conclusion and recommendation. The evidence before us indicates the opposite is true.

He also should have discussed his opinion and recommendations with the RCMP prior to presenting it to the Attorney General in order to give them the opportunity to provide further information or argument to support their initial recommendation.

Coles assumed personal carriage of the case and then failed to consult with the proper officials in his own Department and the RCMP before providing an erroneous and misleading opinion to the Attorney General. We received no satisfactory explanation as to why Coles acted in this manner, but there is no doubt his conduct was wrong.

On October 29, 1980 Attorney General How, relying on the opinion of his Deputy, publicly announced there had been no criminal wrongdoing on the part of either the chartered banks or Thornhill and that no charges would be laid. How told us he was not aware that the RCMP had, in fact, recommended that a charge be laid and that others be carefully considered. In our view, Coles should have advised the Attorney General of the RCMP's recommendation.

Coles testified the Attorney General's public announcement - which was made without prior consultation with the RCMP - was not intended to prevent the RCMP from proceeding with a further investigation or laying charges. "I hadn't even thought about the response that the RCM Police might give to that," he told us. "I was thinking more in terms of responding to the inquiries that were being made by the media." (Transcript, Page 15063) However it is difficult to reconcile his testimony with the fact that he neither engaged the available resources of the Department in a proper and thorough examination of the facts and of the law nor briefed the Attorney General on the contrary position held by the RCMP.

Regardless of whether How knew about the RCMP's recommendation, his public announcement that no charge be laid was a marked departure from appropriate practice. It had a chilling effect on the RCMP and effectively foreclosed further discussion of the matter.

Given that the Attorney General's announcement was based on the erroneous and misleading information Coles had provided, we must conclude that the Deputy Attorney General was actively circumventing the RCMP and orchestrating the matter to reach a conclusion he had predetermined. Coles orchestrated this on his own without instruction or interference from the Attorney General.

We accept that Attorney General How genuinely wished to distance himself from the decision in the Thornhill matter. This was a correct and proper position to take. However, he was - as he himself recognized - ultimately responsible for any decision taken. While it is acceptable and appropriate - and indeed, necessary - that the Attorney General be entitled to rely on the opinions provided by senior departmental lawyers, we do not believe it is appropriate for an Attorney General to delegate decision-making totally to a Deputy Attorney General or other official.

The Attorney General is in the unenviable position of being both a politician and the Crown's chief law officer. As the chief law officer, How bore the political responsibility to be accountable, which meant he had to do more than simply accept Coles' opinion and advice. At the least, the Attorney General should have inquired about the position of the RCMP, and should have satisfied himself that the normal processes and reviews had been carried out within the Department. By accepting Coles' seriously flawed opinion without question, How failed to properly exercise his constitutional responsibilities as chief law officer of the Crown.

The Attorney General's announcement raised serious questions within the RCMP. On November 5, 1980, at the request of 'H' Division, RCMP Deputy Commissioner Raymond Quintal chaired a meeting at RCMP headquarters in Ottawa. Its purpose was:

Exhibit 165, Page 55

> ...to discuss in depth the problems derived from the Attorney General of Nova Scotia['s] comments to the media that no charges were warranted. To provide Headquarters with advice and guidance input into a sensitive discussion in connection with a high profile investigation. To test the strength and weakness of the investigation.

> To plan a course of action on how best to deal with the fact that the provincial A.G. has stated his opinion to the press without giving the RCMP an opportunity of rebuttal or comment.

Fourteen RCMP officers attended this meeting, including the second and third most senior officers in the Force, the Officer in Charge of the federal Commercial Crime Branch and his senior staff and the Commanding Officer of 'H' (Nova Scotia) Division and his senior personnel, including the investigating officer.

The minutes of that meeting reveal that:

Exhibit 165, Page 56

> The submission and the investigation were queried on all aspects, for the investigation had to stand the test of our own internal scrutiny so as to create a united front. Case law and other precedents were cited to support the necessary elements required to support a charge...
>
> A further brief discussion was held on the fact that the Force was morally obligated to lay an information if the evidence supported such action. It was noted that the Force has not consistently followed this procedure in past years as some divisions have accepted a written submission from the A.G.'s. [which states that a stay of] proceedings would be entered should a charge be laid. This written decree from the A.G. has been sufficient to deter the laying of the information.

The unanimous conclusion reached at this meeting was that:

Exhibit 165, Page 57

> The investigational evidence supported a prima facie case under sec. 110(1)(c) against Thornhill.

The participants decided the Force should prepare a further report outlining the jurisprudence for the Attorney General's consideration. This report was not prepared. They also decided to inform him in writing that the RCMP intended to pursue a charge against Thornhill under Section 110(1)(c). (Exhibit 165, Page 57)

A week later, on November 12, 1980, Superintendent Feagan met with How and Coles at How's office. Feagan advised them that the RCMP still believed there was sufficient evidence to lay charges and RCMP officers were preparing a submission on that, which they would soon forward to the Attorney General. The meeting was apparently heated, with the conversation primarily between Coles and Feagan. How testified that "I didn't really say very much during the meeting. I was more of a listener." (Transcript, Page 15120) Coles made it clear he believed the Attorney General's announcement of October 29, 1980 was not merely an opinion but a decision not to lay charges. He warned Feagan it would be dangerous for the RCMP to proceed in opposition to that decision. As far as Coles was concerned, the matter was closed.

Superintendent Feagan wrote to the Commissioner in Ottawa on November 19, 1980 and advised him of the Attorney General's position. In the course of his memorandum to Headquarters, Superintendent Feagan presented the problem in these terms:

Exhibit 165, Page 79

> Provided we do have sufficient evidence to lay a charge, the dilemma then is whether or not we, the investigating police force, should exercise our right to initiate prosecution when the Attorney General of the Province has ruled no such action be taken.
>
> ...If a charge is laid in the face of the Attorney General's instructions, our future relationship with the Attorney General and his Deputy will be difficult regardless of the outcome of court action. ...On the one hand I feel we should exercise our right on the matter of principle in this Nova Scotia case. On the other hand we may well have already set precedent by complying with the instructions of Attorneys General with respect to similar cases in other provinces. Since we are a national force working under like contracts with several provinces, I feel we must apply like policies in each province. Your direction is requested on an urgent basis, please.

In response, Deputy Commissioner Quintal advised him by memo on December 17, 1980 as follows:

Exhibit 165, Page 94

> 80.12.17
> C.O. "H" - Halifax
> Re: Roland J. Thornhill (BD: 34-09-01)
> Receiving Benefit, Section 110(1)(c) C.C. Halifax, Nova Scotia
>
> Your correspondence of 80.11.19 with attachments, as well as previously supplied material has been studied and discussed by both the D.C and myself. Our observations, comments and directions are as follows.
>
> Dealing first with the question of having your opinions as to the law and jurisprudence reviewed by independent outside counsel, we are convinced that this should not be done. There are questions of both propriety and spending authority involved, and in respect of the latter, only the Department of Justice can authorize the employment of counsel by the R.C.M.P. for such purposes. Indications are they would probably not authorize such expenditures, keeping in mind the constitutional form of government as it presently exists in Canada, and the relevant responsibilities and powers bestowed upon the province and its chief law officer. The Commissioner has not, however, made a formal request to Justice in this regard.
>
> In a situation such as this one, it would not be inappropriate for the police to urge the Attorney General himself to seek advice outside his own department, indeed outside his own province, as others have done in the past in order that whatever advice is received, it would stand a chance of being perceived as objective and unbiased. If possible, this should be done at the time of referral to the Attorney General. In the present case, given the known attitude of the Attorney General and his officials along with what has transpired so far, it would be impractical to do so now. To conclude on this point, no outside opinion will be sought by the Force at this time, nor should we urge that course of action on the Attorney General.
>
> Turning to the material provided you by Mr. Coles in his seven page memorandum to the Attorney General, I must agree that while it makes some relevant points with respect to the position of the Banks, and the effect of Section 110(b) of the *Criminal Code*, it fails to address in an informative, convincing fashion, the position of Mr. Thornhill vis à vis the unique requirements of Section 110(c) C.C. Nor does it pay sufficient heed to the deliberate differences which exist between those two sub-sections and the reasons for those differences as they seem to be set out in jurisprudence. No useful purpose would be served by providing more layman's analysis of the law in this area but, that, and a careful study of the material your investigators have put forward, convinces us that at least no overlooked automatic defence, or justification for such behavior on the part of Mr. Thornhill exists. Some reasonable and probable grounds to lay a charge under Section 110(c) against Mr. Thornhill appear to be present.
>
> Having said that however, we do not agree with the position of the Officer in Charge of your C.C.S. when he states in his memorandum to your CIB Officer dated 80.11.17 that, 'all that is necessary is that there are reasonable and probable grounds to believe that an offence has been committed and reasonable and probable grounds to believe that the person to be charged committed that offence,' before proceeding. We believe our obligations as peace officers go beyond that and if they do not, then the discretion which we have all executed from time to time in the proper performance of our duties has been misplaced. The eminent British jurist, Sir Hartley Shawcross, expresses the

proposition that it has never been the rule that suspected offences must automatically be the subject of prosecution and that the public interest is the dominant consideration. Decisions as to what is or is not in the public interest are very much the proper concern of an Attorney General. I believe the opinions of your OIC CCS as set out above are an oversimplification of the position we find ourselves in and for that reason, not particularly useful in coming to the decision we must now reach.

You have not understated at all the serious consequences we could look ahead to if a charge against Mr. Thornhill was to be laid. These consequences would be even more serious, and completely predictable, if the charge was laid, a prosecution took place and the case was dismissed. In the situation at hand, your investigators were denied the traditional interim step of consultation with a Crown counsel, which step is of great assistance in coming to a better appreciation of the evidence, available defences, interpretation of the law, etc. You have had substituted for that, a much less dynamic exercise, one which cannot help but impair the opportunity for investigator and Crown counsel to intelligently assist each other in formulating a course of action. It is indeed regrettable that you or your investigators were not afforded the opportunity of this consultative process with those who had replaced the usual Crown counsel. You were instead provided by the D.A.G. a seven page memorandum outlining his advice to his Minister and, I believe it is essential that you respond to him in writing with some comment about the insufficiency of that memorandum with regards to intent. It seems to be established in *Regina* vs *Williams*, and in *Regina* vs *Ruddock*, that the only proof of intent required under Section 110(c) for an offence to have been committed is the acceptance, knowingly, of a gift, benefit, etc. It may suffice to quote the following from *Regina* vs *Williams:* 'An offence under Section 110(1)(c) is the acceptance of a benefit without having first obtained a consent. No other intent is required under that specific sub-section.' It is to be pointed out that our differences of opinion on that point contributed to the delay and the difficulty we have experienced in determining an appropriate course of action.

We have given long consideration to the course of action to be followed in this case, and have carefully reviewed the actions of Mr. Thornhill and the banks. It is our considered opinion that charges against Thornhill and/or the banks ought not to be laid against the wishes of the Attorney General and his Deputy Minister as re-emphasized to you during your meeting with them on 80.11.12 that 'the result was not a mere opinion but was a decision that no charge would be laid.' (Your memo of 80.11.19 refers.)

With respect to Thornhill, the following considerations weighed heavily in our decision to provide you with the directions contained herein.

- Mr. Thornhill accumulated these debts over a long period of time during which he took some initiatives, none of them full and complete to pay them off.
- His ability to liquidate his debts in the foreseeable future was considered unlikely on the basis of his 'after tax' fixed income, by his accountant and obviously agreed to by the bank who accepted his offer.
- He, with the assistance of X and his accountant, was the one who engineered the final settlement and in the process, wound up paying off his debts at twenty-five cents on the dollar. Given the fact that: (a) bankruptcy might have been cheaper, (b) one, possibly two of the banks had already written off these debts, (c) he now has an obligation to X amounting to yearly repayments of $3,600 each and has signed over his share of the Thornhill home. - It could be argued that: (a) he hardly received a benefit at all, (b) if he did, he received it from X not the banks.

The opposite argument of course is that he was over $142,000 in debt one day and only about $43,000 in debt the next day, a rather favorable turn of events to be sure. It seems very unlikely however that a jury of twelve, no matter how instructed, would ever unanimously agree that a conviction was appropriate. It is likely that they would be impressed by such probable defence witnesses as the Premier (if in fact he is the 'head of the branch of government') who could be expected to testify that he would have willingly authorized Mr. Thornhill's activity had he been asked to. I think they would also feel some sympathy for the accused and in the absence of any specific evidence that he was preparing to favour the banks in some way, would exercise that sympathy to Mr. Thornhill's benefit. I do not presume to be a substitute for the courts, but these are factors that needed serious consideration before embarking on a course of action in defiance of a specific directive of the A.G. He is to be advised that in the present case, we will abide by his directive.

It is our further opinion that no false pretence investigation should be pursued against Mr. Thornhill as a result of the information and documentation you have accumulated to date on this file. There may well be an offence there in connection with misrepresentations he made to the banks, however, since there is no indication they wish to complain or lay charges themselves, it would be perceived as an exercise of dubious faith if we were to simply re-orient our efforts away from s. 110(c), upon which the Attorney General has pronounced himself, and towards another *Criminal Code* section which may or may not be easier to prove. The above also applies to the question of conspiracy and I think you will be able to agree that if we do not proceed under section 110(c), the file should be closed. The A.G. is also to be informed that we do not intend to pursue the matter.

I appreciate that your investigators may be less than satisfied with this approach. They have done their work thoroughly and with competence. The activities of Mr. Thornhill and his associates, as well as the practices and procedures of the banks involved have been brought under appropriate scrutiny. I trust they will be able to take satisfaction from having conducted themselves objectively and professionally throughout. That is in itself a worthwhile accomplishment.

To resume, the Attorney General should be advised that: (a) the *Williams* case seems to contradict the D.A.G.'s interpretation of intent under Section 110(c) of the *Criminal Code*, as stated above; (b) in this case, after very careful consideration of all the factors involved, we have decided to abide by his instructions that charges are not to be laid, as conveyed at the meeting of 80.11.12; (c) we do not intend to pursue an investigation of a possible offence of false pretence by Mr. Thornhill regarding possible misrepresentation to the banks when obtaining some of his loans. There is no complaint from the banks, nor do we have an indication that they would be prepared to lay charges themselves, based on their previous reluctance to deal with Mr. Thornhill in relation to his loans. It would be perceived as an exercise of dubious faith on our part to re-orient our efforts away from Section 110(c) at this time; and (d) upon receipt of his comments to (a) above, we will consider our file closed.

Please advise us of the reaction of your Attorney General once your approach is finalized. We would be particularly interested in whether or not he has a change of mind with respect to the question of intent vis à vis Section 110(c).

On December 22, 1980, Feagan wrote to Coles to advise him that, "After a careful consideration of all facts involved it has been decided that... charges against Thornhill and/or the banks will not be laid in contradiction to the wishes of the Attorney General." Feagan reiterated he believed there were some reasonable and probable grounds to lay a charge under Section 110(1)(c) against Thornhill. (Exhibit 165, Page 98)

RCMP Commissioner Simmonds testified about Quintal's decision to abide by the "directive" of the Attorney General.

Transcript, Page 15239

Q. ...At page 96, Commissioner, at the conclusion of the first big paragraph there he says, 'I do not presume to be a substitute for the courts but these are factors that needed serious consideration before embarking on a course of action in defiance of a specific directive of the Attorney General. He is to be advised that in the present case we will abide by his directive.' And this is your Deputy Commissioner speaking, having had the benefit of discussions and drafting of Tom Venner. Were you aware, sir, that there, you were abiding, were you made aware that in not proceeding you were abiding by a directive of the Attorney General?

A. Yeah, I would never, I would not have chosen those words but Quintal was here and he can explain them. But what I would say is that our review of the case indicated that we came to a conclusion that it was not a case to proceed with, not necessarily because the Attorney General said so. Because we had come to that conclusion based on the evidence.

Q. Well, he reiterates on page 97 in his conclusion (b). He says, 'In this case after very careful consideration of all the facts involved we decided to abide by his instructions that charges are not to be laid as conveyed at the meeting of 80/11/12,' which was a meeting that followed the review that took place in Ottawa.

A. I see.

Q. And...

A. Well, I can presume, of course that we're drawn into that kind of discussion because of other correspondence where, you know, I noticed in the file somewhere one of the officers in the Commercial Crime Branch making that an issue. You know, should comply with the directive.

Q. Sure.

A. That became the issue instead of was the evidence sufficient. And I presume that that sort of thing got some discussion during the conversations and obviously, I mean you never want to go head-to-head with a Minister but that does not, that never does remove the principle that if you feel you have the right case to proceed with, you should be allowed to proceed.

Q. I take it that had you been aware that there was some consideration being given to the weight of the directive of the Attorney General, that you would have intervened at the provincial level.

A. Yeah, if any of the officers had come to me and said, 'We're not going to proceed with this because the Attorney General doesn't want us to, but I think we've got a case,' I would have said, 'Wait a minute, let's talk about that. And I'll go and see the Minister if I have to to see what's worrying him because that's not acceptable.'

It is clear from all of the evidence that the RCMP believed there was indeed a *prima facie* case against Thornhill. Whether the RCMP were correct in this assessment is not of concern to us. What does cause us grave concern is that the RCMP believed they had a *prima facie* case against Thornhill, believed they had the ultimate right to decide whether charges would be laid, and yet decided not to lay charges against the wishes of the Deputy Attorney General. They accepted the Attorney General's decision announced on October 29, 1980 as an instruction.

The RCMP clearly recognized that the principle of police independence was being put to the test in the Thornhill investigation. The obligation of the police to proceed with a charge where a *prima facie* case is established was recognized and discussed. The RCMP, of course, were not in an enviable position. The Attorney General had already taken a public position. The chances of changing his mind were not great. Certainly, Feagan's meeting with the Attorney General and his Deputy on November 12 did not suggest the Department would reconsider the matter. Feagan reported this to Headquarters and sought additional instructions.

The evidence indicates that there was no further investigative work done or additional information obtained between the time of the November 5 meeting in Ottawa and Headquarters' instructions to Feagan on December 17, 1980.

It is apparent that a critical factor in the RCMP's decision not to proceed with laying charges against Thornhill was their desire to preserve harmonious relations with the provincial Attorney General and his Department. Retired Deputy Commissioner Quintal, in conjunction with Assistant Deputy Commissioner Venner, was responsible for the RCMP's decision not to proceed. He testified as follows:

Transcript, Page 14800

Q. Now you have indicated to us that the consequences to the RCMP in this case of proceeding with a charge were a relevant factor in making your decision not to proceed, that is the consequences of a daily relationship between the A.G. and the RCMP.

A. Well, it was a fact that you could not ignore.

Q. Now would you accept that the proper role of a police officer is to uphold the law in accordance with his oath?

A. Yes.

Q. And that it should be done evenly, no matter who you're dealing with.

A. Yes.

Q. How can the relationship then between the A.G.'s Department and the RCMP be any factor, any relevance in deciding whether to discharge that responsibility?

A. I don't think you can overlook the fact that these were in, you're in a contractual agreement with the province. I don't think the police are completely... independent is not the word I'm looking for, but, you know, the Attorney General is sort of the chief law officer of the Crown in the province and their Chief of Provincial Police, you can hardly ignore the fact that they have to have a working relationship.

We believe the priorities and values reflected in this kind of approach are misplaced.

While we will discuss what we consider to be the proper constitutional relationship between the police and the prosecutors later, it is sufficient to note at this point that the RCMP failed to adhere to the principles and values they themselves professed to believe in.

On February 25, 1981, Commissioner Simmonds wrote to Attorney General How.

Exhibit 165, Page 117

> This letter is to confirm our recent conversation concerning the Thornhill investigation and is provided in accord with the contractual relationship existing between your office and the Force.
>
> In view of the controversial nature of this case, and the high profile that it has assumed, I took steps to ensure that it was very carefully reviewed within the Force at both the Divisional and 'HQ' level.
>
> Perhaps I should just say that we of course accept the fact that any legal advice required during the course of a criminal investigation that we conduct as a result of our contractual relationship with the Province must come from Law Officers of the Crown within your office.
>
> We also maintain as a matter of principle that police officers have the right to lay charges, independent of any legal advice received, if they are convinced that there are reasonable grounds to do so and provided of course that a Justice well [sic] accept the charges.
>
> Therefore when the Deputy Attorney General advised on the 29th of October 1980 that the circumstances and evidence in this case were such that in his judgment charges were not warranted, and having in mind the principles stated in the two preceding paragraphs, I instructed that the file be carefully reviewed within the Force.
>
> This review was conducted by the Deputy Commissioner for Criminal Operations, Mr. J.R.R. Quintal, my senior staff officer for Criminal Operations at HQ. He convened a meeting at 'HQ' Ottawa on the 5th of November 1980 and was assisted in his review by senior and well experienced officers on 'HQ' staff, as well as the Commanding Officer, Divisional CB. Officer and investigators from 'H' Division.
>
> At the completion of his review he came to the same conclusion as had the Deputy Attorney General, that being that the circumstances of the case as reflected in the file, combined with evidence in the hands of the investigators, did not warrant the laying of a charge nor the continuation of investigation.
>
> Following his review the Deputy Commissioner briefed me on his conclusions, and although I did not personally review the file or sit with the review team, I fully support the decision reached by the Deputy Commissioner on the facts as he related them.

> What is important of course is that this is a judgment reached entirely within the Force and without outside influence or direction. Had we come to a different conclusion we would have sought further discussion with the Deputy Attorney General following which, if differences had not been reconciled it might have been necessary to present an Information and Complaint to a Justice, well knowing that any subsequent decision as to whether or not prosecution proceed was a matter entirely for your consideration. However, in view of our assessment and conclusions neither step was necessary.
>
> I trust that the foregoing adequately describes our handling of this matter.

This letter was not only written at How's request but was also a second draft - How testified Simmonds' first letter was not as clear as he wanted that the decision was taken independently by the RCMP. He asked Simmonds to provide a second letter, which he did. The first draft was not located in the files of either the RCMP or the Department of Attorney General.

Simmonds testified he had not been told of the conclusions reached at the RCMP's November 5 meeting when he wrote his letter. He also did not know Feagan had already met with How and Coles to try to resolve the matter.

Commissioner Simmonds' letter is seriously misleading. Only in the most narrow sense can it be argued that the RCMP's final decision with respect to the Thornhill matter was "a judgment reached entirely within the Force and without outside influence or direction." The public announcement by the Attorney General, the threat by the Deputy Attorney General that working relationships would be jeopardized, and the Deputy Commissioner's acceptance of the Deputy Attorney General's position as a directive are all outside factors that clearly made the RCMP "super cautious". (Transcript, Page 15255)

The Simmonds letter, which was prepared for public consumption, is misleading in another important respect, namely Simmonds' statement that:

Exhibit 165, Page 118

> Had we come to a different conclusion we would have sought further discussion with the Deputy Attorney General following which, if differences had not been reconciled it might have been necessary to present an Information and Complaint to a Justice, well knowing that any subsequent decision as to whether or not prosecution proceed was a matter entirely for your consideration. However, in view of our assessment and conclusions neither step was necessary.

In fact, the Force had come to a different conclusion, did seek further discussion with the Deputy Attorney General and could not reconcile their differences. What the RCMP failed to do was to follow through on their stated "principle that police officers have the right to lay charges independent of any legal advice received if they are convinced that there are reasonable grounds to do so." (Exhibit 165, Page 117) The Simmonds letter simply does not square with the facts. Simmonds testified that if he had been aware of all the facts he would have written the letter differently:

Transcript, Page 15253

Q. Well, knowing what you know now, would you have written that paragraph in the same way you wrote it?

A. I perhaps would have written it differently.

Q. What would you have said?

A. Well, what I probably would have said would be you know, draw a lesson from this case. When cases of this nature come along that are very sensitive, and politically sensitive, for goodness sakes don't take it outside of the normal realm of handling cases whether he's a politician or a plumber. Deal with the Crown in the usual way and just let it proceed. Because the perceptions of bad motives suddenly arise when it's handled in a different way. And it was clear some of those perceptions had developed during the course of this investigation. I'm not here to judge whether or not there were any but I have no reason to believe there were from what I know but it certainly allowed those misunderstandings to develop and it could be avoided. Whenever you get a very politically sensitive case, whether it's at the federal level or provincial level, to just make sure it follows the normal route.

The evidence before the Commission indicated that neither the Attorney General nor any of his agents directly or indirectly contacted the Commissioner of the RCMP or his officers with a view to influencing the decision respecting charges. The evidence is that Thornhill did not contact anyone in either the Department of Attorney General or the RCMP to discuss or influence the investigation or the laying of charges. Further, Thornhill did not instruct anyone to make any representations on his behalf, nor was he aware of the steps taken by Coles which constituted a preferred handling of his case.

But the handling of this case by both the Department of Attorney General and the RCMP shows they failed in their obligations to carry out their respective responsibilities fairly and evenhandedly.

The case was handled in the upper echelons of the Department of Attorney General because of Thornhill's profile. Within those upper echelons, it was badly mishandled. The proper relationship between the Crown and police was distorted, destroying one of the fundamental checks and balances in the administration of justice. The result was that Thornhill appeared to have received preferential treatment. Indeed, counsel for Thornhill pointed out to the Commission that his client may well have received preferential treatment from the Deputy Attorney General. Unfortunately for Thornhill, this gratuitous preferential treatment led to the perception that he and his political colleagues had influenced the disposition of the matter. This was not the case.

The RCMP, after an initial hesitation, conducted a full and thorough investigation. When the Department of Attorney General suspended normal procedures, the RCMP was forced to review its thinking in the light of the position publicly adopted by the Attorney General. In reversing its recommendation in spite of its continued belief that it had a case, the RCMP failed in its obligation to be independent and impartial. It was improperly influenced by factors unrelated to the investigation itself, but it attempted to explain the decision not to proceed in evidentiary and discretionary terms. The

RCMP put its working relationship with the Department of Attorney General ahead of its duty to uphold the law.

2.5.4 The MacLean case

This case relates to matters arising from the investigation, charging and conviction of Billy Joe MacLean on four charges of Uttering Forged Documents (Section 326 [now Section 368] of the *Criminal Code*) in connection with expense account claims he submitted as a member of the Legislative Assembly and a provincial cabinet minister.

In October 1983, provincial Auditor General Arnold Sarty met with Inspector Kenneth Blue, the officer in charge of the Commercial Crime Section of the RCMP in Halifax. Sarty wanted the RCMP's advice regarding claims MacLean had submitted that appeared to Sarty to be fraudulent in nature. Blue agreed, and the RCMP advised the Auditor General "that the matters required investigation and appeared to be criminal in nature." (Exhibit 173, Page 14) The RCMP agreed to review the material and report back to the Auditor General.

There was no statutory or constitutional obligation for the Auditor General to seek prior authorization from the Attorney General before entering a formal complaint with the police. Nor was there a contractual duty for the RCMP to obtain the approval of the Department of the Attorney General before commencing a criminal investigation of MacLean.

Subsequently, however, after briefing the Honourable Arthur Donahoe, the Speaker of the House of Assembly, about the situation, the RCMP decided the Department of Attorney General should also be brought into the picture. On October 28, 1983, Sarty wrote to Deputy Attorney General Gordon Coles:

Exhibit 173, Page 28

> We [the Auditor General's Department] uncovered two situations where, based upon the evidence before us, it appeared to us that abuses of the system of a fraudulent nature may have occurred.
>
> We then arranged to meet with representatives of the Commercial Crime Division of the Royal Canadian Mounted Police to get their reaction and for them to tell us, whether in their opinion, further action was indicated. The RCMP have now responded to us. Based upon the evidence that we laid before them, they feel there is justification to take the matter further.

On November 22, 1983, Sarty and his Deputy, Paul Cormier, met with Coles, Gale, Blue and the officer in charge of the RCMP's Criminal Investigation Branch, Superintendent R. A. MacGibbon. During this meeting, Coles agreed to review the law and some of the material presented and then "his Department would advise at a later date of the course of action they would recommend". (Exhibit 173, Page 21)

The next day, Blue sent an internal RCMP memorandum to MacGibbon, advising him that he believed the following possible offences by MacLean required investigation:

Exhibit 173, Page 22

Forgery - Section 325(1) C.C.
Uttered Forged Document - Section 326(1)(b) C.C.
False Pretence - Section 320(1)(a) C.C.
Fraud - Section 338(1)(a) C.C.
Breach of Trust - Section 111 C.C.

At the Department of Attorney General, the MacLean case - like the Thornhill matter before it - was handled personally by Deputy Attorney General Coles. This time, however, Coles did request the assistance of his Director (Criminal), Gordon Gale, in reviewing the file. Gale reviewed the material provided by the Auditor General and on April 2, 1984 - nearly four months after Coles' meeting with Sarty and the RCMP - Gale wrote a memo to Coles:

Exhibit 173, Page 33

> The only charge that could be considered is that of fraud under Section 338 of the *Criminal Code*. However, since it is virtually impossible to prove the LIEB Regulations or that Mr. MacLean had knowledge of them a charge could only be proceeded with if he had not expended the money the [sic] claimed for. In the material we have it appears that the claims are not fraudulent in that he made trips and expended money although there is no hard evidence as to how many trips he made or how much he expended but on the other hand there is no evidence on which to contradict his assertions. If one wanted evidence to prove or disprove his assertions then a police investigation would be necessary....
>
> On the information we have there is no basis for criminal charges in that there is no *prima facie* case if one accepts the explanations given by Mr. MacLean.

Coles forwarded Gale's memo to Attorney General Ronald Giffin on April 18, 1984, along with his own covering memo:

Exhibit 173, Page 35

> It is Mr. Gale's opinion, with which I concur, that the irregularities in Mr. MacLean's compliance with the general regulations made pursuant to the *House of Assembly Act* are more accounting irregularities rather than such as to warrant any further criminal investigation. Mr. MacLean's explanation of the manner in which he filed his statement of travel and living allowances is, in our opinion, a reasonable explanation, particularly in light of the manner in which these regulations are communicated to Members of the Legislative Assembly....
>
> We have communicated our opinion in the matter to the RCMP who, although they were not formally asked to investigate the matter, nevertheless were made aware of the concerns of the Auditor General since Mr. Arnold Sarty had spoken to them on an informal basis before bringing the matter to our attention and raising his concerns with us.

These memoranda provided the basis for the Attorney General to write to Speaker Donahoe April 18, 1984. This letter, drafted by Coles, discusses in detail MacLean's "accounting irregularities" and concludes that:

Exhibit 173, Page 38

> Although some of the other particulars in the supporting statements may raise questions as to their need for the purpose intended, Mr. MacLean's explanation of the nature and purpose of the supporting statements and the letter from the apartment owner acknowledging receipt for payment of accommodation refutes any otherwise *prima facie* consideration of criminal wrongdoing in the matter.

We believe this was a totally inadequate analysis of the substance of the Auditor General's concerns regarding fraudulent activity by MacLean. Quite apart from the question of the competence of Coles and Gale to understand and assess the financial information and documentation that led to the Auditor General's concerns in the first place, we find it astounding that the Department of Attorney General would conclude there was no basis for commencing an investigation when the Director (Criminal) himself so clearly stated: "If one wanted evidence to prove or disprove his [MacLean's] assertions then a police investigation would be necessary." (Exhibit 173, Page 33)

It was - or should have been - evident from the beginning that the only appropriate way to deal with the Auditor General's concerns was to have a police investigation conducted. Gale's memorandum to Coles says as much.

But Gale also says that, "on the information we have there is no basis for criminal charges in that there is no *prima facie* case if one accepts the explanations given by Mr. MacLean." (Exhibit 173, Page 33) What that implies is that Gale was prepared to accept MacLean's explanation at face value without having a police investigation to determine the truth of the situation. This is not a proper exercise of prosecutorial discretion.

There is no justification whatsoever for the failure of the Department of Attorney General to make sure that a full police investigation was carried out. Without such an investigation, the conclusion that there was no criminal wrongdoing by MacLean was unwarranted and unsupportable. The Department simply did not have the information necessary to make that determination.

For their part, the RCMP did nothing after turning the matter over to the Department of Attorney General in November 1983. They clearly believed the matter required investigation, but they did not commence that investigation until April 1985 when Vince MacLean, the provincial Leader of the Opposition, requested them to do so.

The RCMP had a right and a duty to proceed with a criminal investigation on the basis of the information provided by the Auditor General. While it may have been reasonable for them to delay temporarily that investigation while Coles reviewed the relevant legislation, they should have gone back to him when they received no response after a reasonable period of time. If they still got no response, they should have proceeded with their investigation.

The RCMP's handling of this case indicates a reluctance to proceed with a politically sensitive criminal investigation without clear authorization from the Department of the Attorney General. This is not only a dereliction of duty but also a failure to adhere to the principle of police independence. It reflects a double standard for the administration of criminal law, contributes to the perception of a two track justice system and undermines public confidence in the integrity of the system.

RCMP testimony before us provided no principled explanation for their prolonged delay in starting this investigation. The charitable view is that this inactivity was due to confusion and muddled thinking regarding roles and responsibilities. Superintendent

MacGibbon, as officer in charge of the Criminal Investigations Branch of 'H' Division, had a duty to make sure an investigation was carried forward to a point where a decision could be made about whether to lay charges. MacGibbon, however, took no independent initiative, responding only after a specific formal complaint was lodged.

Superintendent MacGibbon testified as follows:

Transcript, Page 15444

Q. Now that's why I'm suggesting to you that if you found that out with respect to someone who's not a member of the Legislature, you've got a *prima facie* case of fraud, forgery, that you would proceed and do the investigation. You wouldn't just put the brakes on and wait for somebody to come and tell you to do something else.

A. Well, I think in the events that were happening at that time, I became aware that negotiations, meetings were being held, I believe, with the Speaker and I believe Mr. MacLean and I think Mr. Cormier was involved in those things. And, again, the, as I presume, was all part of the work-up to the Auditor General's report that was due in the Legislature. And those events were happening and I'm not so sure that my position was getting stronger. I felt my position was getting weaker while those things were going on. And I was reluctant to launch out into a full-blown investigation as these things were going on. I wasn't privy to all of the things that were happening at that time period.

Q. And be that as it may, I come back to my suggestion to you, that had this not been an investigation or an alleged criminal activity by a member of the legislature, that the RCMP would have treated it differently. They wouldn't be waiting for anything. They'd be forging ahead, doing their investigation.

A. I would hope that we would apply the rule of common sense and Mr. Citizen would get equal treatment. That if there was some doubt or something needed to be checked, I would hope that proper research would be done the proper work would be done and then go ahead with the investigation.

Q. I'm not suggesting for a moment, sir, that you wouldn't do a proper investigation and I believe that's all you've suggested that every citizen is entitled to a proper investigation. I'm merely suggesting to you that as of November the 22nd, 1983, the RCMP stopped doing any investigation with respect to this and weren't going to do any more unless they received instructions from someone to do it.

A. I'm sorry, I disagree with you, sir.

Q. Okay. Then was it your intention on November 22nd, 1983, to launch an investigation of Mr. MacLean's activities?

A. We would have gone ahead at that time.

Q. Why didn't you?

A. Why didn't we?

Q. Yeah.

A. We were waiting for that undertaking from Mr. Coles.

Q. What undertaking?

A. That he would review the regulations and the statutes, as he stated he would, and he would come back to us.

Q. But I thought you already agreed that no regulation, no matter what it says, is going to justify forgery and you had a *prima facie* case that forgery had occurred.

A. I guess I can only...I can only think that we treated them as opposed to single offences that we treated it as an overall, a fraud in the largest...in the broadest sense and that the things that were happening were not help...going to help any investigation that we...

Q. Okay. Let me move on.

A. So rather than, rather than deal with a single offence of forgery, we sat and waited.

Q. Let me move on.

Once the RCMP did launch a full-scale investigation in April 1985 - 18 months after Sarty first approached them - it was carried forward professionally and thoroughly and resulted in MacLean's conviction on the basis of the same evidence available in 1983 as a result of the Auditor General's audit.

In April 1986 MacLean was charged with ten counts of fraud, uttering a forged document and forgery, contrary to Sections 338(1)(a) [now 380(1)(a)], 326 (1)(b) [now 368(1)(b)], and 325(1) [now 367(1)] of the *Criminal Code*. Within the Department of Attorney General, the file was assigned to Norman Clair, a Halifax-based Crown prosecutor. This arrangement was in accordance with proper practice and procedure. A preliminary inquiry was scheduled for October 14, 1986. But on September 2, 1986, MacLean's defence counsel, Joel Pink, wrote Clair concerning the possibility of a plea bargain.

Clair sought instructions from his superior Martin Herschorn on what the Crown should accept as a plea and should seek on sentence. Herschorn, in turn, contacted Attorney General Ronald Giffin to seek his views. Herschorn testified as follows:

Transcript, Page 15502

Q. Why would you ask for Mr. Giffin's direction in this case?

A. The case was an obvious profile and it was one that, in my view, warranted the concurrence of the Attorney General and the Deputy Attorney General in the eventual decision taken by the Attorney General's Department.

Q. Had you on any previous occasions involving a plea bargain had occasion to approach the Attorney General directly?

A. Yes.

Q. And can I ask you if that was in any kind of political kind of case? ...

A. No, I don't recall there having been any precedent of any sort of political case that comes to mind. Certainly in cases of profiles, a murder situation where manslaughter was being discussed, as one example, there would be discussions with the Attorney General.

Q. So in your discretion if a murder is viewed as high profile you may involve the Attorney General with respect to ...

A. Not necessarily high profile. Anything that I feel in my assessment warrants the concurrence of the Minister, and that is hard to categorize the types of cases that I would want to discuss with him.

Q. It's my recollection...

A. It may be a matter in which the particular crime was notorious in the area and there was public concern about it and I would want to ensure that the Minister of the day was comfortable with the position which his agents would be taking before the courts.

Giffin testified he had attempted to follow a hands-off policy when the matter had originally been raised by the Auditor General in 1983-1984. This was in accordance with what Giffin perceived to be the approach taken by his predecessor in the Thornhill matter. While it is highly desirable that the Attorney General not become routinely involved in individual cases, the Attorney General - as we pointed out in connection with the Thornhill matter - cannot simply delegate all his responsibilities to his Deputy. Cases brought to the attention of the Attorney General will usually be high profile or public interest cases. The Attorney General's duty in such cases is to instruct his officials to direct that all normal processes and procedures be followed and to make sure that the disposition of the case is not influenced by the high profile of the case or person investigated.

Although we have already made the point that an Attorney General should be able to rely on the advice or opinions given by departmental officials, he or she must also be satisfied that such advice or those opinions contain no obvious errors, and that all necessary background work has been done.

We believe that when Giffin wrote to the Speaker in April 1984 (Exhibit 173, Page 37), effectively dismissing MacLean's problems as accounting irregularities, he placed unwarranted reliance on the views of his Deputy. Giffin was or should have been aware that the RCMP had not conducted a proper investigation. He was or should have been aware that Gale considered a police investigation necessary and that the actions of MacLean were not criminal only if one accepted MacLean's explanations. These "red flags" should have been enough to alert the Attorney General, and should have led him to request a police investigation.

Generally we do not consider it appropriate for an Attorney General to become personally involved in discussions about plea and sentence unless there is a significant public interest factor involved. We believe it was unfortunate Herschorn chose to involve Giffin directly. By so doing he placed the Attorney General in a difficult position. Giffin should not have become involved in the details of the plea discussions. When approached by Herschorn, he could have appropriately set general guidelines, advising Herschorn to make sure that any agreement conformed to dispositions of comparable charges in the same or comparable circumstances. He should have emphasized that the Crown position should reflect the seriousness of the offence and the need for the disposition to represent a deterrent to others.

Instead, Giffin became involved in approving the actual position the Crown would take in court. After at least two telephone discussions with Herschorn, Giffin indicated his agreement to the plea and sentence agreement worked out between Clair and MacLean's counsel. Although MacLean's counsel testified that he thought the agreement was "a very good deal for my client" (Transcript, Page 15665), we are satisfied that Clair, the Crown prosecutor, also agreed with the disposition of the matter. He testified:

Transcript, Page 15886

> **A.** ...I felt, based on what I knew of the case and what the courts would be seeking from me that this was a reasonable approach and I have no reason today to change my mind.

No representations were made or influence exerted by MacLean or anyone on his behalf other than by counsel. In short, no improper factors, political or otherwise influenced the ultimate disposition of the case. Giffin did no more than to respond to requests for his advice, and he did not in any way impose his own views on the

Crown prosecutor. Having said that, however, it is worth pointing out that the public perception that MacLean was treated differently by the justice system would only be fueled by the Attorney General's direct involvement.

While the ultimate disposition of the MacLean case was unexceptional, the route that led to it was twisted. The response of the justice system to the Auditor General's concerns illustrated once again an undue and improper sensitivity to the status of the person investigated.

The RCMP failed in their duty to carry forward a criminal investigation when circumstances demanded it. The officer in charge of the commercial crime section specified in writing the possible offences requiring investigation but no investigation was commenced until some 18 months later, and then only after pressure from the Opposition. This once again demonstrates a lack of independence in law enforcement in high profile cases that are likely to bring the RCMP into conflict with the Department of Attorney General.

Within the Department of Attorney General, the case was improperly and poorly managed. Prior to the start of the police investigation in April 1985, Coles assumed personal control of the file and singlehandedly ensured that no investigation would be carried out. Despite Gale's views that a police investigation would be needed and despite the clearly incriminating material in the hands of the Auditor General and the RCMP, Coles did not request any further investigation or analysis. His dismissal of the matter as "accounting irregularities" can only be described as cavalier, and an improper and unprofessional exercise of the responsibilities entrusted to him as Deputy Attorney General.

2.5.5 Conclusions

The Thornhill and MacLean investigations indicate that those being investigated did not interfere in the administration of justice. Neither did anyone act improperly on their behalf. Both cases, however, show there is a two tier system of justice - that the system does respond differently, depending on the status of the person investigated.

The police are more reluctant to investigate a politician than an Indian and - despite their claim to an unquestioned right to investigate and lay charges in "ordinary" cases - suddenly become inordinately concerned about their working relationships with other police forces or with the Department of Attorney General when cases bring them into conflict with those authorities.

Officials in the Department of Attorney General are more concerned about the career of a politician than the reputation of an Indian; they are quick to write superficial and unprofessional opinions that support not investigating or charging a politician yet search for reasons to limit the compensation paid to an Indian for years of wrongful imprisonment; and they require substantially more likelihood of conviction before charging a politician than an Indian.

These are indications of serious weaknesses in the justice system. They are all the more serious because they are not simply overt interference. They exhibit a deep-rooted and unwritten code that status is important, and that one is not blind to influence in enforcing the law. Such an attitude makes the ideal of justice for all meaningless, and renders the goal of complete public confidence in the system of administration of justice impossible.

In our analysis of the Marshall, Thornhill and MacLean investigations, much of our criticism of the mishandling of those cases (Marshall from 1982 on) has been directed at Deputy Attorney General Coles. He has since been replaced. However, we believe the weaknesses that have developed in the system of law enforcement are such that they cannot be remedied simply by replacing one individual.

A full and clear understanding of the proper roles and relationships of and between the Attorney General, Crown prosecutors and the police is essential and fundamental to a fair system of justice. This understanding must be coupled with a system which is organized and structured so as to protect and enhance those proper relationships and which will, in so far as possible, minimize the possibility that their integrity can be compromised by any one individual.

We turn now to a discussion of those roles and relationships.

2.5.6 History of the Office of the Attorney General

The office of Attorney General in Nova Scotia has roots that can be traced back six centuries to ancient English precedents. Today's office is the result of centuries of adaptation and the evolution of earlier systems arising out of quite different social and political conditions.

The system of criminal prosecutions in England developed on the assumption that every member of the community had a responsibility for keeping the peace and bringing offenders to justice. It may have been the "King's peace" but everyone had a stake in preserving it.

By the mid-thirteenth century the King apparently felt it necessary to be represented directly in order to prosecute cases of particular concern to him. Consequently, in 1243 the King made his first appointment of an *attornati regis* or "King's attorney". By 1399, a single King's attorney had been appointed with general responsibility for all of the King's business in all courts, a practice that continued throughout the fifteenth century. In 1461, the King's attorney was described for the first time as the Attorney General of England. In the same year, a King's solicitor was appointed. By 1515, he was described as the Solicitor General. By the early sixteenth century, therefore, the offices of both Attorney General and Solicitor General had been established. By the beginning of the seventeenth century, these officers were required to be members of the House of Commons, a practice that continues today. Through a slow process over more than three centuries, the Attorney General and Solicitor General became recognized as the law officers of the Crown.

The colonial model in Nova Scotia and the other North American colonies was very similar to the English model, including the fact that common law powers and privileges make up a very important part of the powers and duties of the Attorney General. Today, the extent of the Attorney General's powers is determined by that common law base, as well as by the *Criminal Code*. Among the most important prosecutorial powers the Attorney General has are the right to initiate and conduct prosecutions, (including taking over and conducting private prosecutions) and the right to terminate prosecutions.

The first legislative definition of the functions of an Attorney General in Canada is contained in the legislation setting up the federal Department of Justice in 1868. It reads in part as follows:

> 2.
> The duties of The Minister of Justice shall be as follows: He shall be the official legal adviser of the Governor and the legal Member of Her Majesty's Privy Council for Canada: It shall be his duty to see that the administration of public affairs is in accordance with law; He shall have the superintendence of all matters connected with the administration of Justice in Canada, not within the jurisdiction of the Governments of the Provinces composing the same; He shall advise upon the Legislative Acts and proceedings of each of the Legislatures of the Provinces of Canada, and generally advise the Crown upon all matters of Law referred to him by the Crown; and he shall be charged generally with other duties as may at any time be assigned by the Governor in Council the Minister of Justice.
>
> 3.
> The duties of The Attorney General of Canada shall be as follows: He shall be intrusted with the powers and charged with the duties which belong to the office of the Attorney General of England by law or usage so far as the same powers and duties are applicable to Canada, and also with the powers and duties which by the laws of the several Provinces belonged to the office of Attorney General of each Province up to the time when the British North America Act, 1867 came into effect, and which Laws under the provisions of the said Act are to be administered and carried into effect by the Government of the Dominion; He shall advise the Heads of the several Departments of the Government upon all matters of Law connected with such Departments; He shall be charged with the settlement and approval of all instruments issued under the Great Seal of Canada; He shall have the superintendence of Penitentiaries and the Prison System of the Dominion; He shall have the regulation and conduct of all litigation for or against the Crown or any Public Department, in respect of any subjects within the authority or jurisdiction of the Dominion; And he shall be charged generally with such other duties as may at any time be assigned by the Governor in Council to the Attorney General of Canada.

This legislation was adopted as a model by most provincial legislatures for defining the role of their respective Crown law officers. In Nova Scotia, the *Public Service Act* of 1900 first defined the responsibilities of the Attorney General, which have remained unchanged since that time. Section 4 of the *Public Service Act* sets out the Attorney General's responsibilities in the following terms:

> **4.**
> The functions, powers and duties of the Attorney General shall be the following:
> **(a)** he shall be the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council;
> **(b)** he shall see that the administration of public affairs is in accordance with the law, and shall have the superintendence of all matters connected with the administration of justice in the Province not within the jurisdiction of the Dominion of Canada;
> **(c)** he shall advise the heads of the several departments upon all matters of law concerning such departments or arising in the administration thereof;
> **(d)** he shall have the settlement and approval of all instruments issued under the Great Seal;
> **(e)** he shall have the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of the Government;
> **(f)** he shall have the functions and powers which belong to the office of the Attorney General of England by law or usage so far as the same are applicable to this Province, and also the functions and powers which previous to the coming into force of The British North America Act, 1867, belonged to the office of Attorney General in the Province of Nova Scotia and which under the provisions of that Act are within the scope of the powers of the Government of the Province;
> **(g)** he shall have such other powers and discharge such other duties as are conferred and imposed upon him by any Act of the Legislature of the Province, or by Order in Council made under the authority of any such Act.

The Attorney General also possesses a number of discretionary powers not set out in the Act, including the discretion to prefer a direct indictment, to proceed with a prosecution, to withdraw charges and to enter a stay of proceedings at any time after a prosecution has been launched and before a judgment entered.

Simply stating the powers of the Attorney General, of course, does not make clear the principles that should govern the proper exercise of those extraordinary powers. Neither does such a statement delineate the appropriate relationship between the Attorney General and other members of Cabinet when it comes to exercising that prosecutorial discretion.

In fact, the important and special constitutional characteristics of this unique office are not widely understood, even among those who occupy it from time to time.

John Ll. J. Edwards, The Attorney General, Politics and the Public Interest, (1984) Page viii

> This unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent bar and the public prosecutors, the state and the citizenry at large.

2.5.7 Governing principles - independence, accountability and control

The office of Attorney General functions within the context of two key constitutional principles - parliamentary supremacy and the rule of law. The rule of law includes - and requires - equality before the law. As the then federal Minister of Justice, Ron Basford, explained in the House of Commons in 1978:

John Ll. J. Edwards, The Attorney General, Politics and the Public Interest, (1984) Page viii

> ...the second principle is that every citizen is subject to the law. One of the pillars of our system of government, dating back three centuries, is that neither the King nor any other person, be he a member of this House, a member of the government, a member of

> the press, or someone possessed of title or position, is above the law. The law should apply to all, equally. He who breaks it must bear the consequences.

Roy McMurtry, then Attorney General of Ontario, expressed a similar view in the legislature of Ontario. He said authorities:

Legislature of Ontario Debates. 2nd session, 31st Parliament, No. 3, pp. 50-2

> ... must be scrupulous to treat all members of the community equally without any regard to their position. ...the holders of public offices will receive the same treatment under the law as the ordinary citizen even though the consequences may be more injurious.

The principle that no person is above the law has now been entrenched in our Charter of Rights and Freedoms. As a practical matter, that means its importance has been enhanced because there can now be judicial scrutiny of this exercise of state power.

The principle of parliamentary supremacy normally includes - by convention - the notions of executive accountability to the legislature and ministerial and collective cabinet responsibility.

But the Attorney General is more than just a minister of the government. The Attorney General occupies a special position in relation to both the cabinet and the legislature.

As the chief law enforcement officer, the Attorney General bears a ministerial responsibility for decisions made by his Department and is accountable to the legislature. (While the Attorney General's ultimate accountability for the exercise of broad discretionary powers has traditionally been to the legislature rather than to the courts, the advent of the Charter of Rights and Freedoms as well as recent court rulings - such as the one by the Supreme Court of Canada in *Operation Dismantle* v. *The Queen* (1985), 18 D.L.R.(4th) 481) - suggests that discretionary decisions of the Attorney General may be subject to judicial review in the future, thus introducing a new dimension to the scope of his or her accountability.)

At the same time, other members of cabinet, who usually collectively share responsibility for decisions and directions of their colleagues, do not have to take any role or responsibility in connection with decisions the Attorney General makes in exercising his or her prosecutorial discretion. In fact, it is not constitutionally proper for them to direct those decisions. As law officer of the Crown, the Attorney General must exercise his or her prosecutorial function as an independent officer, independent of pressure from his or her cabinet colleagues. The prosecutorial decision is that of the Attorney General. The result is that the Attorney General occupies a position of independence unique among cabinet ministers.

The classic statement of principle illuminating the unique position of the Attorney General when deciding whether to prosecute in a particular case was made by Sir Hartley Shawcross, then British Attorney General, in the House of Commons in 1951, when he stated as follows:

H.C. Debates (U.K.), Vol. 483, cols. 682-684, 20 January 1951

> ...There is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the government's political fortune; that is a consideration which never enters into account....
> I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations.

Over the years since then, a number of Canadian Attorneys General have made essentially the same point. In 1978, for example, Justice Minister Ron Basford defended his handling of proceedings under the *Official Secrets Act* against Tom Cossitt, a Member of Parliament, and the Toronto Sun newspaper with this argument:

H.C. Debates (Canada), Vol. 121, pp. 3881- 83, March 17, 1978

> I am aware that, since the enactment of the *Official Secrets Act*, this would appear to have been the first occasion in Canada where consideration has to be given to the provisions of the *Official Secrets Act* and the right of a member of the House to freely express his views in the House in the course of carrying on his parliamentary business. The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself. That is not to say that the Attorney General is not accountable to parliament for his decisions, which he obviously is... Clearly, I am entitled to seek and obtain information from others, including my colleague, the Solicitor General, and the Commissioner of the Royal Canadian Mounted Police on the security implications of recent disclosures. This I have done. In my view, the special position of the Attorney General in this regard is clearly entrenched in our parliamentary practice. Based on these authorities and on my own experience as a member of the government for ten years, which has included my three immediate predecessors, this special position has been diligently protected in theory and in practice. In arriving at these [governing principles] I have been guided by recognized authorities such as Lord Shawcross, Edwards, Erskine May and Bourinot, and more recently and very helpfully, many valuable discussions with Commonwealth Attorneys General in Winnipeg, and more particularly my personal conversations at that time with the Attorney General of England and Wales [Mr. Silkin] and the Lord Chancellor [Lord Elwyn Jones].

Similar sentiments were expressed by Basford's successor, Senator Jacques Flynn:

Appendix to Senate Debates, October 18, 1979

> In dealing with a case which has been referred to him, the Attorney General is unquestionably entitled to obtain information and advice from whatever sources he sees fit, including his colleagues in Cabinet. The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of Parliament or anyone else in discharging his duties in the enforcement of the law. On the other hand

> he must, of course, be prepared to answer in Parliament for what he does. These principles are well known and established not only in Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists.

More recently, Ontario's Attorney General, Ian Scott, talked about this same point :

(1986-87) 29 Crim. L.Q. 187 at p. 190 and 191

> ...issues of whether to institute or discontinue a prosecution are not matters of government policy. The Premier and Cabinet have no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken. These decisions rest solely with the Attorney General, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge.... The absolute independence of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle.

In 1988, John Crosbie, a former Attorney General of Canada, responded to a question in the House of Commons on behalf of the then Attorney General this way:

H.C. Debates (Canada), Vol.129, pp. 18437-38, August 17, 1988

> Mr. Speaker, with respect to the *Borowski* case, the Chief Law Officer of the Crown, the Attorney General of Canada, has filed, as he must do, a brief in that case setting forth a factum, setting forth the law which the law officers of the Crown feel to be pertinent to the questions in the appeal. His document is a legal submission, Mr. Speaker, not a statement of government policy. It sets forth an analysis of the current state of the law rather than being a statement of what the law might be or should be. That is the position taken by the Attorney General, who, in these matters, must operate independently of the Government. The Government cannot direct the Attorney General, nor the law officers of the Crown, as to what legal opinions they must produce.
>
> They must give their unvarnished legal opinions, undeterred by government policy and separate altogether from any directives or directions of the Government. The Attorney General asked the court to postpone the appeal until Parliament had dealt with the matter so that the questions could be heard in a legislative context. That was his request which the court turned down. The matter is now going forward.

Although we believe there is a better understanding and acceptance of the proper principles governing the exercise of the Attorney General's prosecutorial discretion today, we have concluded that we should commend to the attention of cabinet ministers and the Attorney General (and their departmental officers) the principles set out above and the writings of such leading authorities as Professors John Edwards and Philip Stenning.

2.5.8 The role of the local Crown prosecutor

For the most part, the powers of the Attorney General are exercised by his agents, the local Crown prosecutors.

Crown prosecutors are appointed by the Attorney General and must follow his or her instructions in carrying out their duties. In any prosecution, Crown prosecutors always act as the agent of the Attorney General, making them the local embodiment of the Attorney General's discretionary prosecutorial powers.

There has been a full time prosecution service in Nova Scotia only since 1966. Its operation is based on the *Prosecuting Officers Act*, which came into force on July 1, 1960 and has not been amended since then.

Under Sections 5 and 6 of that Act, a prosecuting or assistant prosecuting officer has "all of the powers, authorities and duties provided by the Criminal Law of Canada for prosecutors, or for prosecuting officers, or for counsel for the Attorney General." Under Section 7 of the Act, the Attorney General can appoint a special prosecuting officer "if for any reason the Attorney General considers it in the interests of the administration of justice to do so." Such an appointment may be revoked by the Attorney General at any time, or the terms of appointment varied.

Of particular significance in defining the legal relationship between the Attorney General and Crown prosecutors is Section 11(1) of the Act which provides as follows:

> The Attorney General may prescribe the duties of prosecuting officers or of a prosecuting officer and may from time to time issue instructions to prosecuting officers, which instructions it shall be the duty of the prosecuting officer to observe and follow.

While the local Crown prosecutor is legally required to follow the lawful instructions of the Attorney General and is accountable for the conduct of any case, the local prosecutor has full responsibility for conduct of individual cases as a practical matter, and only in the most exceptional cases should an Attorney General or senior departmental officers become directly involved. The Attorney General, of course, remains ultimately accountable for the actions of the local prosecutors. This relationship was well described by Mr. John Clement, when in 1975, as Attorney General of Ontario, he stated that:

Philip C. Stenning,
Appearing for the Crown (1986) Page 311

> The general supervisory power created in the evolution of the common law and confirmed by statute in Ontario means the local Crown Attorney must always be accountable to the Attorney General. However, it must be stressed that this accountability is part of the continuum. While a Crown Attorney is accountable to the Attorney General, in a very general sense, for his behaviour and activities in the administration of justice, the Attorney General is accountable to society specifically and answers in the Legislature for the entire process through which justice is administered in the province. ....
>
> It has never been suggested, however, that the Attorney General assume responsibility for the day-to-day administration of justice. Under our system, the Attorney General is ultimately responsible to the people while local Crown Attorneys are granted a broad and generous area of unfettered discretion in criminal prosecutions. Subject only to very wide and general guidelines as to policy, the Crown Attorney is free to decide whether or not to launch a prosecution, the manner in which it will be prosecuted and how he will handle the matter at trial. In all these matters and in the general administration of justice within his jurisdiction, the Crown attorney knows that he has more than enough authority to respond adequately to the situations in which he is involved.

In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition.

In his judgment in a 1955 Supreme Court of Canada case, Mr. Justice Rand gave classic expression to this concept:

Boucher v. The Queen, [1955] S.C.R. 16 at 23

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have the duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed with legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.

More recently, the Ontario Court of Appeal held that:

R. v. Logiacco (1984), 11 C.C.C.(3d) 374 (Ont.C.A.) at 379

> Great trust is placed in the Crown prosecutor by the courts and by the public. Heavy obligations are imposed upon him in his quasi-judicial role. To be worthy of the trust and reliance which is placed in his office, he must conduct himself with becoming dignity and fairness.

Attorneys General, and their agents, the local Crown prosecutors, clearly exercise enormous discretionary powers when carrying out their prosecutorial functions. At the same time, the positions they occupy are also obviously ones of great trust that demand standards of personal and professional integrity, competence and commitment to fundamental principles of an equally high order.

2.5.9 The decision to prosecute

We start with the fundamental proposition that "justice must not only be done, but must be seen to be done." The ultimate test of whether justice is seen to be done, of course, is how the public perceives the handling of any particular case. If there is a broadly held belief that the justice system, or one of its components, has handled a case unevenly or unfairly, that is a strong indication something is amiss. In such a situation there is truth to the notion that perception becomes reality; like a cancer, it spreads insidiously throughout the community with debilitating and corrosive effects within and without the system.

An isolated case of substantial or perceived injustice can seriously damage the public's confidence in the administration of justice. A series of such incidents can create widespread cynicism and lack of faith. The Donald Marshall, Jr. case is clearly one of substantial injustice. In the end, the injustices in the Thornhill investigation and the MacLean case had more to do with form and process than substance, but the way in which they were handled contributed greatly to a widespread public perception that there is a separate system of justice - with special treatment and special advantages - for those occupying positions of political power and influence.

The result has been, at best, public questioning of the fairness of the system and, at worst, a loss in public confidence in the integrity of the system itself. Ultimately, the integrity of the administration of justice depends on the integrity, independence, character and professional competence of the law officers of the Crown.

John Ll. J. Edwards, (1969) 12 Crim. L.Q.417 at 424

> Nothing is more calculated to engender disillusionment with the criminal justice system and its constituent parts - the police, prosecutors, judges or the executive branch of government - than disclosures indicating a susceptibility to extraneous pressures. I have no doubt in my mind that the greatest safeguard against the sullying of the pillars of justice is to be found in the integrity and independence of the individuals who, in their respective capacities, have to administer the several parts of the system. Without these personal qualities any structure is extremely vulnerable. The responsibility of government is to create the kind of machinery that will assist, rather than prejudice, the fulfillment of those ideals which are essential to maintaining public confidence in the criminal justice system.

While those personal qualities of independence and integrity are the foundation of the system, they must be supported by an organizational structure that provides checks and balances against potential abuse.

We have considered a number of alternative models in order to come up with a workable framework for the exercise of prosecutorial decision-making. Edwards, in his research for the Commission, described six prevalent models for such decision-making. (Volume 5, Pages 96-98) We also considered a series of alternative approaches reflected in the systems in the Republic of Ireland, Northern Ireland, Scotland and New Zealand. In addition, we looked at the American experience with an Office of Special Prosecutor or Independent Counsel, which developed in response to the Watergate affair of the early 1970s.

In considering and evaluating the appropriateness of all of these various approaches to the Canadian and Nova Scotian context, we have been guided by several principles. The first is that any model must ensure the maximum degree of independence from improper extraneous influences in the conduct of prosecutions. A closely related principle is that parliamentary or legislative accountability for the exercise of prosecutorial decision-making in individual cases must be maintained.

The challenge has been to find the model that best reflects the right blend of independence and accountability. We believe it is essential to our system of justice that a minister of the Crown continue to be responsible to answer for the administration of justice in the legislature. Even if the Attorney General were a non-political, independent public servant, we believe it would be essential that that individual continue to be accountable to the legislature.

That is why we reject the concept of a totally independent Director of Public Prosecutions (or Attorney General), who would be accountable to no one except his or her conscience and the law. We also reject the concept of a "special prosecutor" appointed on an *ad hoc* basis because we believe a properly structured organization staffed with competent individuals should provide the necessary independence in the prosecutorial process.

In order to guarantee the maximum independence in prosecutorial decisions, we believe it is vital that the minister of the Crown responsible for the administration of justice become involved in the disposition of individual cases only in the most exceptional circumstances and that the nature and extent of any such involvement be publicly recorded.

As a matter of principle, we do not believe it is appropriate for the Attorney General to become involved in day-to-day decisions affecting individual cases, but we recognize there will be exceptional circumstances in cases that raise public interest issues with significant implications for the public at large. We believe such considerations, which are admittedly political in the broad sense of the word, are legitimate factors to be weighed in the exercise of prosecutorial discretion. The important point, however, is that these must be made public.

As a result of all of those considerations, we are recommending creation of the office of an independent Director of Public Prosecutions in Nova Scotia. We believe that the creation of such an office, similar to the one adopted in the Commonwealth of Australia, will go a long way to restoring the public's belief that their criminal justice system is being administered properly and with fairness to all.

Recommendation 35

We recommend that:

(a) *there be created by statute the office of Director of Public Prosecutions, and that the holder of this office:*

(i) *be a member of the bar of Nova Scotia (or equivalent) for a minimum of ten years;*

(ii) *be appointed by the Governor in Council after consultation with the officers of the Nova Scotia Barristers Society and with the two Chief Justices of the Superior Courts in Nova Scotia, for a term of ten years, with eligibility for re-appointment;*

(iii) *be removable for cause by the Governor in Council only after a resolution from the provincial legislature approving such action;*

(iv) *be paid and given employment benefits not less than those of a judge of the County Court of Nova Scotia, and have the status of a departmental "deputy head";*

(b) *the duties and responsibilities of the Director of Public Prosecutions include:*

(i) *the exercise of all of the functions of the Attorney General as agent and deputy of the Attorney General in relation to the administration of criminal justice in the province, subject to paragraph (c) below; and in particular;*

(ii) *regular consultation with the Attorney General concerning all aspects of public prosecution and the administration of the prosecution service;*

(iii) *the direction of the prosecution service of the province,*

including supervision of those functions presently exercised by the Director (Prosecutions) and the Director (Criminal);
(iv) *the presentation of an annual report to the Attorney General on the conduct of public prosecutions in the province, which shall describe, among other matters, any personal interventions by the Attorney General pursuant to paragraph (c)(i);*

(c) *the Attorney General continue to exercise the duties and responsibilities traditionally accorded to that office in relation to the administration of criminal justice, subject only to the limitations which follow:*

(i) *where he or she deems it necessary, the Attorney General may intervene in a prosecution contrary to the advice of the Director of Public Prosecutions but only through the use of written instructions which shall be published within 30 days of their issuance in the* Royal Gazette, *or following expiry of the appeal period, whichever is later;*
(ii) *the Attorney General shall, after consultation with the Director of Public Prosecutions, issue guidelines for the exercise of prosecutorial discretion which shall be tabled in the provincial legislature as soon as is practicable after their issuance; and*
(iii) *the Attorney General shall table in the provincial legislature as soon as is practicable the annual report received from the Director of Public Prosecutions pursuant to paragraph (b)(iv).*

In the summer of 1989 the Nova Scotia Government advertised for a position entitled "Director of Public Prosecutions". This position was described as being one of independence with security of tenure. The position is however, non-statutory, and accordingly, as an Order in Council appointee, the DPP's authority will inevitably be subject to the views of Cabinet. In Recommendation 35 we have recommended that the office of DPP be statutory. We have made this recommendation because we believe that public confidence in the administration of justice in Nova Scotia is lacking, and that there is a perception of political interference. A DPP who is not protected by statute is not a satisfactory solution to this lack of confidence.

2.5.10 The police

From our review of the Marshall, Thornhill and MacLean matters, it is clear the police do not consistently exercise their independent right to commence an investigation and lay a charge. If the criminal justice system is to function fairly, the police must carry out their responsibilities without being influenced by extraneous considerations.

Inherent in the principle of police independence is the right of the police to determine whether to commence an investigation. While the responsible ministry can set general policies with respect to all policing matters, including investigations, no police force should consider that it requires authorization from the Crown before commencing an investigation.

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function - that of investigation and law enforcement - is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

Recommendation 36

We recommend that the following policy statement be included in the Crown Prosecutors' Manual:

(a) *in the investigation of offences prior to the laying of charges, it is understood that the police officers are to carry out their duties in accordance with the law and general standards, practices and policies established by the Solicitor General, but in consultation with the appropriate Crown prosecutor where necessary; and*

(b) *after the laying of charges, police shall carry out any investigations in accordance with the instructions of the Attorney General or appropriate prosecutor with a view to preparation of the case for presentation in court.*

We believe that the right of the police to lay a charge ensures protection of the common law position of police independence and acts as an essential check on the power of the Crown. As one Nova Scotia Crown prosecutor put it in our survey:

Volume 6, Page 48

> Provides a check on power of Crown; if Crown could order that a charge not be laid, there is no accountability and the whole procedure would be secret; if police lay charge - Crown must determine its future in open court (i.e. withdrawal, stay, charge, proceed).

There are cogent arguments for the Crown to screen potential police charges, including the suggestion that the police too often overcharge, or charge inappropriately or inadequately with the result that it creates inefficiencies in the system and extreme prejudice to the accused.

Balance must be maintained between the right of the police to lay a charge and the right of any citizen not to be charged without a thorough investigation and due consideration. While our system clings to the presumption of innocence, it is an inescapable fact that charging an individual results in damage to that individual and his or her reputation or career that is all but irreparable.

We do not wish to interfere with the right of the police to lay a charge, but when competent Crown law officers give advice in good faith, we believe that advice should be rejected only after careful consideration. If there is a disagreement, it should be first discussed between the police force and the Department of Attorney General at correspondingly higher levels. If a disagreement still exists after pursuing such discussions to the highest level on each side, the police should then, if they still feel it is warranted, lay the charge. The police department should have a clear written policy setting out the steps to be taken in the event of a disagreement between the police and Crown respecting the laying of a charge.

There should be increased and more effective consultation between the police and the Crown in preparing charges in order to eliminate problems of overcharging or poorly drawn charges. At the same time, there should also be a system of post-charge screening to facilitate the elimination of unnecessary charges prior to arraignment and the termination of prosecutions that ought not to go forward.

This issue was carefully considered by the 1981 Philips Royal Commission on Criminal Procedure in the United Kingdom. We agree with the following philosophy and underlying principles:

Report of the Royal Commission on Criminal Procedure (1981), Pages 146-149

> We want to secure that after a clearly defined point during the preparation of a case for trial and during its presentation at trial someone with legal qualifications makes the variety of decisions necessary to ensure that only properly selected, prepared and presented cases come before the court for disposal; and to do that without diminishing the quality of police investigation and preliminary case preparation and without increasing delays.
>
> In order best to attain this we would leave with the police complete responsibility for investigating offences and for making the initial decision whether to bring the matter before a court (that is, under present procedures, whether to charge or to apply to the court for issue of a summons or warrant of arrest), or to take no proceedings. It also includes the decision whether to caution as an alternative to prosecution which in our view should continue to be the responsibility of the police.... Once that initial decision has been taken the case is within the jurisdiction of the court. This seems to us to be the clearest point which for the purpose of legislation, can be used to mark the division in responsibilities of the police and the prosecutor. After that point the case should become the responsibility of the latter...; he may then on the information before him decide to proceed as charged, or to modify or withdraw the charges. In practice there is, of course, a variety of decisions taken as a case is being prepared for trial and is being tried. Those decisions will be for the prosecutor; and it is in that sense that he will have responsibility for the conduct of the case once the initial decision to proceed has been taken.
>
> ...The police will retain unimpaired their law enforcement role and the primary responsibility for bringing detected offenders before the courts. Because of this the police will have to develop their cases as well as they can..., and where they have any doubt or need guidance on points of law or evidence will consult the local prosecutor before they initiate proceedings, ...Thus the police will be required to sustain their standards of training and performance in all aspects of their investigative work, including case preparation. The prosecutor will have an independent role in the later stages of the process and an enhanced status because of that. His experience of the courts' view of cases that are improperly brought in terms of the public interest will enable him to act as an additional filter on proceeding with such cases and his role and status in the system will add weight to his advice to the police on these types of case before the initial decision to proceed is taken. The system is, therefore, one which depends upon cooperation, with checks and balances operating within a framework in which all are seeking the same objectives.

> ...Drawing the line at the point of charge both recognizes the need for the police to continue to have discretion over the initiation of proceedings as an essential element to their law enforcement role and has the merit of being clear cut. We do not imagine that it will eliminate all disputes since whenever issues are delicately balanced one must expect debate and possible disagreement. But we expect there to be consultation, as there is now. The police and the prosecutor will be aware of the other's interests and responsibilities. As we have observed earlier the roles are interdependent. They must inevitably work in partnership.

In Nova Scotia, there clearly has been confusion over the question of the police's unfettered right to lay charges. In the Thornhill investigation, for example, Deputy Attorney General Gordon Coles strongly believed that he, acting for the Attorney General, had the right to instruct the RCMP not to lay charges. Although the RCMP did not accept the validity of this position, they did acquiesce in the face of the Attorney General's wishes.

We believe the most appropriate way to handle such situations is reflected in the way the Morgentaler matter in *Campbell* v. *Attorney General of Ontario* was dealt with by Ontario Attorney General Ian Scott. After the charges were laid, Scott stayed proceedings in open court and publicly stated the reasons for his decision.

Campbell v. *Attorney General of Ontario* (1987), 31 C.C.C.(3d) 289 (Ont. H.C.) at 292

> Constitutional authority in this country, and the United Kingdom, makes it plain that the decision to investigate alleged offences and to lay charges is the constitutional responsibility of the police. The Crown Law Office must determine how and when to proceed with charges once they are laid. In 1925 Sir John Simon made it plain that there was no obligation to prosecute merely because there is what the lawyers call 'a case'.
>
> The discretion of the Attorney General to proceed with a charge in any given time, now or later, is a quasi-judicial one in which the effect of the prosecution upon the administration of law and of government in the abstract must be considered.

In this case, the police advised the Attorney General that they intended to lay charges. The Attorney General acknowledged their right to do so, but advised that he would enter a stay once charges were laid. He did not attempt to interfere with, or direct, the police in this case. We agree with Scott that the proper resolution of this difference of opinion was through an open and public process in which each authority exercised its proper constitutional responsibilities.

Recommendation 37

We recommend that:

(a) *police officers be informed in general instructions from the Solicitor General that they have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid;*

(b) *within each police force there be a clear written policy on resolving disagreements between police and Crown over the laying* *of charges, and that such policy provides that no charge shall be laid contrary to the advice of the Crown unless and until discussions have been held between the highest levels of police and Crown;*

(c) *within each police force and within the Department of Attorney General there be a clear written directive requiring absolute confidentiality and secrecy of the identity of persons being investigated other than on a need to know basis within the police force and the Department;*

(d) *prosecutors be informed in general instructions from the Attorney General that police officers have the right and the duty to determine the form and content of charges to be laid in any particular case, subject to the Crown's right to withdraw or stay the charges after they have been laid;*

(e) *police officers and Crown prosecutors be informed by their respective departmental superiors that police are encouraged to consult with the appropriate prosecutor concerning the drafting of informations, where such consultation might be thought useful; and*

(f) *the Attorney General institute a system of post-charge screening in appropriate locations in the province (initially as a pilot project) to ensure that no charges which are not strictly necessary in accordance with the evidence and the public interest shall go forward.*

2.5.11 Termination of prosecution - public interest factors

The Crown bears the final burden of deciding whether a prosecution will actually take place. Although the police usually only lay a charge after a proper investigation and after the Crown, at least in complex cases, agrees there is sufficient evidence to sustain a conviction, the Crown remains the guardian of the public interest - occasionally it may be decided that the public interest requires that an otherwise well-founded prosecution should not proceed.

In the words of Lord Shawcross:

Draft English Criteria for Prosecution, cited in Volume 6, Page 50

> It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should... prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration.

While decisions to discontinue a prosecution in the "public interest" must be made on a case-by-case basis, there should be clear direction on what types of considerations are properly in the public interest. At present, there is no such direction in Nova Scotia. In exploring this subject in his research, Professor Archibald found that:

Volume 6, Page 52

> ...responses to the Crown Survey give great cause for concern. They indicate on the part of many prosecutors a basic lack of understanding of what has traditionally been conceived of as an important aspect of the exercise of prosecutorial discretion. This may be attributable to an inadequate grounding in criminal law theory during their basic legal training. However, it is clear that the Department of the Attorney General is not correcting this misconception over public interest factors in the prosecution of offences. The Blue Binders of 'Advice to Prosecuting Officers' do not address these issues and the apprehensiveness of the Director (Prosecutions) on the issue would not lead one to conclude that matters are being clarified regularly in other ways... To prevent injustices and the costs of needless prosecutions, a public interest policy ought to be developed. Such policies have been developed in England, Australia and the United States, and provide a rational basis for identifying the public interest factors which should lead a prosecutor not to prosecute even where the evidence would allow it.

During the public hearings, we were told of a shoplifting case that occurred in Sydney. The police laid charges but, prior to trial, a friend of the accused contacted Deputy Attorney General Coles about the case. Without first contacting the local Crown prosecutor or reviewing the file, he instructed the local prosecutor to withdraw the charge. The prosecutor complied, stating in open court that he had been instructed to withdraw the charge.

Coles testified that he issued his instruction because of the health and age of the accused, and the fact that the accused was no longer a resident of the area. Whatever the legitimacy of the actual decision itself, the direct intervention by the Deputy Attorney General, following a phone call from a friend of the accused, is a blatant misuse of authority. To issue instructions to withdraw a charge without consulting the responsible prosecutor and without reviewing the facts of the case can only be described as a highly improper exercise of prosecutorial discretion. Such improper and unprincipled interference can only lend credence to a public perception that justice varies according to who you know.

Recommendation 38

We recommend that:

(a) *the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;*

(b) *the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:*

- **(i)** *the triviality of the alleged offence or that it is of a "technical" nature only;*
- **(ii)** *the age, physical health, mental health or special infirmity of an alleged offender or witness;*
- **(iii)** *the staleness of the alleged offence;*
- **(iv)** *the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);*
- **(v)** *the likely effect of a prosecution on public order and*

morale;

(vi) *the obsolescence or obscurity of the law;*

(vii) *whether the prosecution would be perceived as counter-productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);*

(viii) *the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;*

(ix) *the prevalence of the alleged offence and any related need for deterrence;*

(x) *whether the consequences of any resulting conviction would be unduly harsh or oppressive;*

(xi) *any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;*

(xii) *the attitude of the victim of the alleged offence to a prosecution;*

(xiii) *the likely length and expense of a trial;*

(xiv) *whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;*

(xv) *the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;*

(xvi) *the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice;*

(c) *the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:*

(i) *the alleged offender's race, religion, sex, national origin, political associations, or beliefs;*

(ii) *the prosecutor's personal feelings concerning the victim or the alleged offender;*

(iii) *any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or*

(iv) *the possible effect on the personal or professional circumstances of those responsible for the prosecution decision;*

(d) *where the prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question;*

(e) *the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.*

2.5.12 Prosecutorial discretion in the conduct of trials

Once the Crown has determined that a prosecution will proceed, the adversarial aspects of the criminal justice system are evident. The accused is normally represented by defence counsel, the Crown's case is presented by the prosecutor and the trial is conducted before an independent judge with or without a jury.

While the courtroom setting is adversarial, the Crown prosecutor must make sure the criminal justice system itself functions in a manner that is scrupulously fair. The phrase "criminal justice system" is not a mistake of history - we do not have a "criminal convictions system". Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The Crown prosecutor as the representative of the State is responsible for seeing that the State's system of law enforcement works fairly. This is nowhere more apparent than in the Crown's obligation to disclose its case to the accused.

2.5.13 Disclosure

We discussed earlier the critical failure of the Crown to disclose its case against Marshall. Both before and after trial, the Crown's failure to disclose information to Marshall's counsel contributed to his conviction and continued imprisonment.

In discussing disclosure, it is opportune to remind ourselves of the comments of U.S. Supreme Court Justice Brandeis in *Burdeau* v. *McDowell*, 256 U.S. 465 (1921) at 476:

> And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.

As will become apparent in this section, our view is that anything less than complete disclosure by the Crown falls short of decency and fair play.

What is the Crown's obligation to disclose its case against the accused? In its written submission to the Royal Commission, the Nova Scotia Branch of the Canadian Bar Association stated the problem as follows:

> What information to disclose to an accused in a criminal matter is a question that has long vexed the legal profession. The answer to this question requires a balancing between the interests of the State in the administration of criminal justice and the right of the accused to a fair trial. On one hand, Crown prosecutors are understandably reticent to release information that, if misused, could result in justice not being done. Witness tampering, fabrication of evidence and alibis to meet the Crown's stated case and the elimination of surprise are just three of the concerns Crown prosecutors raise when asked to broaden the scope of information to be disclosed to lawyers for an accused. On the other hand, lawyers for the defence need sufficient information for the preparation of their case and it is the State that generally controls access to that information. Defence counsel need to know not just the evidence against the accused, but the evidence in his or her favour along with evidence that is apparently neutral,

> suggesting neither guilt or innocence. Only with full and timely access to the information gathered by agents of the State can defence lawyers properly discharge their burden of holding the State to the criminal burden of proof.
>
> It has long been accepted as indispensable for the fair administration of justice in our society that some access by the accused to the State's case against him or her is required. But what type of access? To statements? To witnesses? To an accused's entire file? And when should access take place? Before the trial? During the trial? Or after the trial if relevant evidence subsequently comes to the attention of the Crown?

It continued at page 69 of its submission:

> Were the Crown disclosure problems in the Marshall case a rarity or were they symptomatic of a general reluctance of the State to provide more information to the accused? Clearly the latter is the case. The issue of State disclosure to the accused, balanced against the accused's right to make full answer and defence, goes beyond Canadian borders.

The Canadian Bar Association brief contains an excellent summary of disclosure practices in Canada, the United States, Europe, Australia and New Zealand. Some of the material that follows is extracted from this brief. (We commend to the reader Volume 1 of the brief which has been appended to this Report as Appendix 15.)

The current debate about disclosure has concerned itself with the extent of disclosure and its timing. Mr. Justice David Watt reviewed extensively the case law on this subject in the recent decision of *R.* v. *Belanger*, a decision which was upheld upon appeal to the Ontario Court of Appeal. ([1987] O.J. No. 850, Action No. 471/87) Mr. Justice Watt held that:

> ...There is neither common law principle nor statutory enactment which imposes upon Crown Counsel in charge of a prosecution a general obligation or duty to make full pre-trial disclosure to the accused or his Counsel of the entirety of the Prosecution's case. ...
>
> Crown Counsel making pre-trial disclosure of the Prosecution's case to defending Counsel ought to do so in a way that is consonant with rather than inimical to his or her role as a representative of the Minister of Justice. Such disclosure as is given must, in a timely and fair manner, apprise the accused of the case to be met and be sufficiently substantial so as not to in any way impair the right of the accused to make full answer and defence at his or her trial. Section 7, as well perhaps as the fair hearing component of paragraph 11(d) of the Charter, provide the constitutional standard against which the prosecutorial conduct in the present case falls to be adjudged.

There is a clear recognition in this case, and in many others, that the accused's right to make full answer and defence, a right provided for in the *Criminal Code*, is one of the principles of fundamental justice referred to in Section 7 of the Charter. There is also a recognition in Canadian case law that the Crown's failure to provide adequate disclosure may impair or even prevent the accused from making a full answer and defence. If this happens, the courts recognize there has been an infringement of Sections 7 and 11(d) Charter rights to fundamental justice and a fair hearing. Similarly, in the United States, the common law of disclosure was developed on the basis of constitutional principles. The failure to disclose exculpatory evidence was held to be a violation of the defendant's right to due process and a fair trial. In *United States* v. *Bagley*, 473 U.S. 667 (1985), the United States Supreme Court concluded that due process was violated only if there was "a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different". The majority of American States have enacted their own rules regarding criminal disclosure. While there is a wide variety of specific enactments, most require a request by defence counsel, and generally the specific material to be disclosed is delineated.

This decision of most American States to codify disclosure requirements is a good one. The approach reflected in current case law involves assessing each individual case of real or alleged non-disclosure to determine if it actually impairs the accused's constitutional right to make full answer and defence. We believe that such an *ad hoc* approach to disclosure means uncertainty and possible unfairness. The inability of an accused to adequately prepare a defence threatens the fairness of the criminal justice system, and it is desirable that as much discretion and subjectivity as possible be removed from decisions concerning disclosure.

The fundamental interest in a fair trial of the accused requires that the accused receive from the Crown all information known to the Crown that might reasonably be considered useful to the accused. The Crown should have a positive and continuing duty to provide this information to the defence. It is immaterial whether or not defence counsel fails to request disclosure of the information in possession of the Crown, or indeed whether defence counsel is negligent in failing to do so. The circumstances of non-disclosure should not be permitted to affect adversely the fairness of the trial received by the accused. The focal point of the issue of fairness is the fact of disclosure of material evidence.

The role of the prosecutor and the obligation of the Crown to disclose its case against the accused has been the subject of considerable comment. Mr. Justice Thomas Zuber, for example, made the point on behalf of the Ontario Court of Appeal in *R.* v. *Savion and Mizrahi* (1980), 52 C.C.C.(2d) 276 that "...a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice...". Mr. Justice Patrick Kerwin of the Supreme Court of Canada in *Lemay* v. *The King*, [1952] 1 S.C.R. 232 at 241 added that the Crown prosecutor's responsibility for the proper administration of justice means, in part at least, that "the Crown must not hold back evidence because it would assist an accused." In the same case, Mr. Justice John Cartwright put the obligation more positively: "I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favorable to the accused or otherwise..." (*ibid.* at 257)

The *Canadian Bar Association Code of Professional Conduct* (1987) provides that the prosecutor's prime duty is:

Canadian Bar Association
Code of Professional Conduct, Chapter VIII

> ...To see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. He should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and to the extent required by law and accepted practice, he should make timely disclosure to the accused or his counsel (or the Court if the accused is not represented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence.

When the Law Reform Commission of Canada considered this question in "Disclosure By The Prosecution" (Report 22, 1984), it stated that:

> It cannot be said that Canadian criminal law enforces a policy of pre-trial disclosure by the prosecution. Apart from specific and limited requirements currently prescribed by law, pre-trial disclosure in Canada is characteristically an informal process, predicated upon the Crown's discretion in the management of its case. To the extent that it exists, pre-trial disclosure is subject to the vagaries of regional practice, plea bargaining and personal relations among members of the Criminal Bar; for these reasons alone it defies systematic analysis as an integral feature of Canadian criminal procedure.

The Crown prosecutor occupies a dual role, being obligated on the one hand to prosecute vigorously those accused of crime, and on the other hand to ensure that the power of the State is used only in the pursuit of impartial justice. But it is not realistic to believe that the prosecutor does not have an interest in the outcome of a criminal trial. To expect any prosecutor to evaluate with any degree of objectivity whether certain evidence in his or her possession will be of use to the accused may be too much to expect in everyday practice.

An obligation to disclose all relevant information is not inconsistent with the proper working of the adversary system. For this system to work, and for justice to be attained, equal parties must participate on an equal basis. This means that the accused must have access to the information in possession of the Crown in order to properly prepare his or her case. Whether or not to disclose information is not a decision that should be left to the discretion of the prosecutor. A statutory obligation to disclose is necessary, and we believe that sufficient protections can be built in to such a statutory obligation to minimize most of the concerns that Crown prosecutors generally raise when considering the issue of full disclosure. For example, the existence of possible witness intimidation can be considered and ruled upon by a justice on an application by the Crown. The policy must be in favour of disclosure, unless the Crown is able to satisfy a justice that there are good reasons for not disclosing in any particular case.

There are two steps in the disclosure process. Initially, the police must be required to place all evidence collected before the prosecutor, so that he or she may evaluate it in order to determine whether the prosecution should be continued; secondly, the Crown must make full disclosure to the accused or his or her counsel.

We have discussed elsewhere in our Report the issue of the police making disclosure to the Crown. The wilful failure of the police to make full disclosure to the Crown must be made the subject of sanctions sufficiently severe to guarantee compliance.

If disclosure is effected on the basis of the statutory obligation which we recommend, there should be noticeable improvements in the pre-trial process generally. A full, timely and continuing disclosure procedure on behalf of the Crown should lead to a shorter and limited form of preliminary inquiry, a productive pre-trial conference to resolve evidentiary and legal issues which are anticipated to arise in the course of a trial, and a meaningful forum for a structured plea discussion. It is accepted that the onus is on the Crown to prove its case beyond a reasonable doubt and that the accused is not required to aid in his or her conviction. However, some experienced defence counsel, in advance of the trial, consistently advise Crown counsel as to the general nature of the defences upon which they propose to rely. This practice is commendable. It narrows the issues in dispute and provides a more orderly trial.

An analysis of our criminal law jurisprudence reveals two opposing, although not irreconcilable, positions. The law exists to protect society against lawbreakers, and at the same time, to safeguard the liberty and freedom of the individual against the power of the State. Our system of justice must strive simultaneously to guarantee that the rights of the accused will be respected without sacrificing the interests of society. Improving the efficiency of procedures will not impair the balance between those rights and interests. If the integrity of the judicial system in criminal law is to be maintained, we must eliminate those anachronistic and outmoded procedures which breed contempt for the law and which, if left unchecked, will continue to impede the administration of justice. An obligation on the Crown to make full disclosure to the defence is the foundation upon which a fair and efficient system of administration of criminal justice can be built and maintained.

Comprehensive federal legislation is needed to provide an accused with legally enforceable rights. Until the enactment of such legislation, the Province of Nova Scotia should publish a directive embodying the recommendations which we now set out.

Recommendation 39

We recommend that the Department of Attorney General of Nova Scotia urge the Federal Government to implement amendments to the Criminal Code *of Canada as follows:*

1. *A justice shall not proceed with a criminal prosecution unless he is satisfied:*

(a) *that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that* *prosecution; and*

(b) *that the accused has been advised of his right to disclosure.*

2(1) *Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:*

(a) *to receive a copy of his criminal record;*

(b) *to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;*

(c) *to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;*

(d) *to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;*

(e) *to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;*

(f) *to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;*

(g) *to receive a copy of the criminal record of any proposed witness; and*

(h) *to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.*

2(2) *The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the Crown and may be limited only where, upon an* inter partes *application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.*

2(3) *Subsection (1) imposes a continuing obligation on the prosecutor to disclose the items as above provided.*

2(4) *A statement referred to in sub-paragraph (b), (d) or (f) of subsection (1) does not include a communication that is governed by the "Invasion of Privacy" provisions of the* Criminal Code.

3. *Where a justice having jurisdiction in the matter is satisfied* *that there has not been compliance with the provisions of subsections 2(1) and 2(2) above, he shall, at the accused's request, adjourn the proceedings until, in his opinion, there has been compliance, and he may make such other order as he considers appropriate in the circumstances.*

Recommendation 40

We recommend that no application to limit disclosure be made without the prior written approval of the Director of Public Prosecutions or a Deputy Attorney General.

Recommendation 41

We recommend that until the proposed statutory amendments to the Criminal Code *are effected, the Attorney General adopt and implement as a matter of policy the duties of disclosure reflected in the preceding recommendation.*

Recommendation 42

We recommend that:
(a) *the Solicitor General inform police forces operating within the province of the Attorney General's directive on disclosure and require compliance with its principles in relations between police and prosecutors;*
(b) *the Solicitor General ensure that continuing police training includes information on the necessity of compliance with disclosure policy.*

2.5.14 Plea discussions

Although the Crown may determine that it is in the public interest to proceed with a prosecution, the exercise of Crown discretion can still affect its ultimate disposition. Citing various "public interest" factors, including the need to have the system operate efficiently and to protect witnesses from the trauma of testifying, Crown prosecutors often enter into discussions with defence counsel to negotiate a disposition of the case.

Commonly referred to as plea bargaining, the process involves discussions or negotiations between the Crown and defence that result in the accused entering a guilty plea in exchange for some perceived benefit. The benefit may be a conviction on a lesser offence, withdrawal of related charges, or what the accused considers to be favorable representations by the Crown at sentencing. While such plea discussions may result in agreement between Crown and defence, their agreement is not binding on the presiding judge who should, however, give appropriate weight to the recommendations of counsel.

The subject of plea discussions and the agreements which result from such discussions has generated considerable controversy within the legal community and among outside observers. Critics of this system argue it depreciates the very values the justice system is intended to serve, placing more emphasis on extra-legal factors - the negotiating skills of lawyers, the extent to which the police may have overcharged an accused, or even crowded dockets - than on the facts of the case and the applicable law. Supporters say plea agreements provide a cost-effective way of resolving criminal charges, thus saving time and expense for all concerned, as well as reducing trauma for accused, alleged victims and witnesses.

Traditionally, Canadian courts of appeal have rejected the notion that courts should be involved in plea bargaining. But the courts have been forced to recognize its existence. The continued smooth functioning of the criminal justice system in Canada depends on a high proportion of guilty pleas. Archibald's research, for example, suggests that between 20-30 percent of all guilty pleas in Nova Scotia result from plea negotiations.

A system of plea negotiations and agreements is a legitimate, and often very sensible, means to resolve criminal cases. However, it is essential that the purposes of such a system be understood and that safeguards be established to ensure that prosecutorial discretion is not used improperly.

There are, of course, inherent dangers in plea bargaining and these must be recognized. One such potential danger is the possibility the police will overcharge or lay multiple charges on the assumption there will be later bargaining. The best way to reduce this possibility is to provide for a policy of full disclosure and early post-charge screening.

The Commission heard evidence concerning plea bargaining in connection with the MacLean case. The public perception that the result was favorable for the accused highlights the need for any negotiations on pleas to be considered only in accordance with clearly articulated and consistently applied principles.

In Nova Scotia the Attorney General has issued a policy directive entitled "Negotiations with Defence Counsel Concerning Plea and Sentence." (Volume 6, Appendix 18) Although it appears to control the exercise of prosecutorial discretion carefully, our research indicates that the directive is inadequate. There is no statement in this directive of the purpose of plea negotiations, no adequate definition of them, no reference to problems of proof and no reference to or recognition of public interest factors. As a result, the statement does not carefully structure the exercise of prosecutorial discretion in plea discussions and agreements.

What does this matter? First, without clearly defined and articulated criteria governing the application of this process, there will inevitably be considerable variation across the province. This situation will necessarily militate against equality of treatment of accused persons under the law. Secondly, in the absence of well defined and publicly known criteria, it is difficult for the public to judge the appropriateness and fairness of plea agreements.

The MacLean case provided an illustration of some of these problems. Without commenting on the actual merits of the plea agreement reached in the MacLean case, we note that there was no detailed criteria against which the MacLean case could be evaluated and judged for conformity and consistency. In the absence of such criteria the public had no basis to judge the appropriateness of the outcome. If public confidence in the system of justice is to be maintained, such cases must be resolved on a principled basis in accordance with clearly defined and publicly known criteria. We do not see fit to recommend that the Attorney General of Nova Scotia support efforts to ensure that the process of plea discussion and plea agreement be made the subject of statutory regulation and control in the *Criminal Code*. We prefer a degree of flexibility rather than the rigidity of statutory regulation.

Recommendation 43

We recommend that the existing policy directive on plea discussions and plea agreements be revised to clearly set out the basis for the exercise of discretion by Crown prosecutors in this area, and that such directive in particular set out the governing principles of openness, voluntariness, accuracy, appropriateness and equality.

2.5.15 Other research findings

The Commission's research on the conduct of prosecutions and the organization of the prosecutorial service covers a number of areas which go beyond the primary focus of the Commission. But we commend the results of that research effort (Volume 6 of this Report) to the Department of Attorney General for consideration, with the following specific additional comments.

2.5.16 Summaries to Trial Judges

These documents are a legacy from the days of the now abolished grand jury proceedings. The presiding judge would use the summary prepared by the Crown prosecutor to outline the nature of the Crown's case prior to the grand jury foreman taking over the proceedings in the jury room. Although the grand jury procedure itself has been abolished in all Canadian jurisdictions, Nova Scotia remains the only province where these summaries to trial judges are prepared. Indeed, in the Marshall case, such a summary of facts was provided by the prosecutor to the trial judge prior to trial.

Current practice in Nova Scotia is that a summary is provided by the prosecutor to the trial judge and defence counsel in a jury case at least 14 days before trial. This summary includes a recitation of the facts, the applicable law related to those facts and an indication of any *voir dires* that in the opinion of the prosecutor will be required. In addition, the prosecutor sends a copy of the preliminary inquiry transcript and the indictment.

We are concerned that the provision of this material to the trial judge may be prejudicial to the accused. We can think of no reason, for example, why the trial judge should be able to read the transcript of the preliminary inquiry, which after all is not even evidence in the proceeding before him. However, the trial judge may be given pre-trial reports and statements of undisputed facts which have been approved by both Crown and defence counsel.

Recommendation 44

We recommend the abolition of summaries to trial judges and the abolition of the practice of providing trial judges with copies of preliminary inquiry transcripts.

2.5.17 Regional prosecuting officers and middle management

Under the current structure of the prosecution service in Nova Scotia the prosecuting officers for each of the counties in Nova Scotia report to a Director (Prosecutions). There are also one or more assistant prosecuting officers appointed in each county and they in turn report to the prosecuting officer for their respective county. As well, there are a number of cross-appointments from one county to another so that each prosecutor may be appointed to more than one position within the three administrative regions of the province.

Our primary concern with these structural arrangements is the absence of any effective middle-level management. As Professor Archibald has noted:

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> There is no effective scheme or regional hierarchical control with delegated authority whereby all county Prosecuting Officers report to a chief Prosecuting Officer for the region who then reports to the Director (Prosecutions). When every one of the 16 county Prosecuting Officers feels that he (there is no she) has direct access to the Director (Prosecutions) and/or the Director (Criminal), it is not surprising that there are problems of administrative congestion. One might expect bottle-necks in communication with those 'up-the-line' on the one hand, and a monopolization of Departmental Directors' time in the grinding detail of individual prosecutions, leaving little time for policy formulation and effective over-all management.

Testimony from the Director (Prosecutions) confirms the correctness of Professor Archibald's observation.

Under these circumstances, senior management becomes inundated with issues and detail that should be dealt with by middle-level management. As a consequence, senior management is not in a position to provide the broad leadership and policy guidance expected of the most senior officers of the Department.

Recommendation 45

We recommend that a system of chief prosecuting officers for each region be adopted in order to create an effective middle level of management in Nova Scotia's prosecution service.

2.5.18 Research facilities

We are also concerned about the quality and variable nature of research facilities available to Crown prosecutors across the province. We commend to the attention of the Department of Attorney General Professor Archibald's conclusions on this subject:

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> By modern standards of criminal law research, the research tools and facilities provided to most prosecutors in Nova Scotia are appallingly primitive. It seems equally shocking that most prosecutors surveyed seem unaware of this. Dramatic action should be taken on this front, since the quality of criminal justice in the province depends in large measure on the quality of legal argument which is presented to the courts. Traditional research tools, by which is meant statutes, case reports, digests and text books must be readily available to all Crown prosecutors. In addition, it is essential for the Department of Attorney General, perhaps in conjunction with the provincial Legal Aid Commission, to explore the possible establishment of a central, computerized legal research facility. The Research Facility of the Ontario Legal Aid Plan provides a useful model for possible emulation in this regard. Advocates of the Ontario Legal Aid Plan system argue that specialized computer researchers are able to improve the efficiency and reduce the cost of legal research. Law students across the country are currently being trained in the use of computerized legal data bases, so that the creation of such a system may be a practical and cost effective means by which to bring the Nova Scotia prosecutor's research capability into the 20th century sometime before its end.

2.5.19 Personnel management

We have already referred to the absence of an effective middle level of management within the departmental administrative structure. There is also a related problem of whether senior management of the Department is effectively utilizing the human resources of the prosecution service in developing policy. The current system of an annual meeting does not appear to be a sufficient or adequate mechanism to provide meaningful input by line prosecutors in the development of departmental policy. There is no Crown prosecutors' association in Nova Scotia, although recently the "Nova Scotia Government Lawyers' Association" was established. The effectiveness of this organization in communicating prosecutors' concerns on a broad range of issues remains to be seen.

One such issue which is of concern to us and requires the attention of the Department is evaluation. Ostensibly, the individual performance of a prosecutor is evaluated by means of the Provincial Government's performance appraisal system. However, Professor Archibald says that:

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> ...all Departmental officials interviewed were of the opinion that this system is not properly adapted for the evaluation of Prosecuting Officers. ....The absence of an adequate system of evaluation is of considerable concern to many of the respondents to the Crown Survey. ... Among those who expressed concern about the absence of an adequate means for evaluation there was a strong sentiment that merit was not being rewarded.

Clearly, evaluation affects job satisfaction, morale, and ultimately the quality of the performance of the Crown prosecution service.

2.6

Police and Policing

While all parts of the criminal justice system were implicated in the miscarriage of justice done to Donald Marshall, Jr., the role of the police was central throughout.

If it had not been for the inadequate and unacceptable initial investigation by the Sydney City Police Department in 1971, for example, Marshall would never even have been charged. If it had not been for the incompetent reinvestigation of the original incident by the RCMP in 1971, Marshall would have been freed within a few months of his conviction.

On the other hand, of course, if it had not been for the RCMP's 1982 reinvestigation of the case following the preliminary work of Steve Aronson, Marshall's innocence might never have been established. But ironically, even that investigation raised questions about policing - about the relationship of police to other authorities in the criminal justice system and about the appropriate exercise of police initiative in conducting investigations and laying charges.

When we turned our attention to an examination of how the criminal justice system handled other cases involving high profile individuals, such as Roland Thornhill and Billy Joe MacLean, we were again confronted with serious questions concerning the role of the police in these investigations.

Clearly, the police play a pivotal role in the criminal justice system. That is partly because the police are the first - and usually only - contact most citizens have with the criminal justice system, so their perception of the system is shaped largely by their individual interactions and experiences with the police. The police are, in effect, the first and main keepers of the integrity and fairness of the criminal justice system. In a democratic, multicultural society committed to individual rights and civil liberties, and organized on the premise of equality of opportunity, the police have a profound and taxing responsibility to balance individual rights with society's need for security.

Nova Scotians expect much of their police forces. Recent research, as well as work done for other Royal Commissions, indicates the public wants its police forces to exercise a wide mandate, to respond - and quickly - to calls for service, to solve crimes and be tough on criminals. At the same time - and equally important - Nova Scotians expect these functions to be carried out in an ethical way, with respect for the rights of the innocent, the accused and the victims.

The police must be sensitive to racial, social and ethnic diversity, even-handed, principled and competent. If they fail to meet any of those expectations, of course, the criminal justice system may be brought into disrepute among the people it serves.

Another reason why proper policing is so important is because shortcomings in a police investigation - the point where the justice process usually starts - may not be caught or corrected later in the process.

In part, this is because of what sociologists like to call the "presumption of administrative regularity". What that means, quite simply, is that everyone assumes everyone else is doing his or her job properly. Such a presumption is basic to the everyday operation of all complex social systems, including the criminal justice system. Police, other police forces, prosecutors, judges and even defence counsel must collaborate and cooperate if the system is to function effectively and efficiently. To do that, they routinely give the benefit of the doubt to the people they work with. While there is nothing sinister about this, it can lead to serious injustices if flawed police actions, for example, are overlooked because everyone else simply assumes the police have done their job properly.

Those who suffer most as a result of this presumption of administrative regularity are the powerless, the young and the vulnerable, and members of minority groups with different values and understandings. They are not well represented in the criminal justice system, and generally do not have the clout that the well-off and those with "contacts" and "credibility" do to force the system's normal checks and balances to operate as they should.

To get a clearer sense of that, we need only compare the handling of the Marshall and Thornhill/MacLean matters. In the Marshall case, the RCMP "botched" its 1971 reinvestigation because the investigating officer presumed the Sydney City Police officers did their jobs properly. Would he have tested that faith more carefully if the accused was of high social standing and influence? In the Thornhill and MacLean investigations, the police hesitated to pursue an investigation without approval from higher authorities. Would they have worried about getting such authorization if the subject of the investigation was an Indian?

The wrongful prosecution of Donald Marshall, Jr. occurred because police actions were inadequate, incompetent and unprofessional. But why were they? Was it simply because the officers themselves were biased against Indians, or Blacks, or young people they considered troublemakers? Or was it because the officers involved were not adequately trained, either in proper investigative techniques or in how to deal with racial minorities?

While we have concluded that the police investigation was influenced, in part, by the fact that Marshall was a Native, we have also found that the flaws in the investigation went well beyond that to inadequate training and deficiencies in the organizational structure of the force. Our analyses and recommendations in this section will focus on those broader questions of organization and training. To assist us in reviewing the role of the police in the criminal justice system, the Commission requested that a comprehensive study be undertaken. This study - "Public Policing in Nova Scotia" - was conducted by Professors Richard Apostle and Philip Stenning, and appears as Volume 2 of this Report. Much of the following discussion is based on the results of the study, but the reader is directed to Volume 2 for a more detailed consideration of the issues.

2.6.1 Changes since 1971

Much has happened in terms of policing in Nova Scotia in the 18 years since the initial Marshall investigation - ranging from changes in the system of policing itself to broader legislative changes, such as the *Young Offenders Act*, the *Canadian Charter of Rights and Freedoms*, and bail reform, which have all had an impact on the policing environment - and we have taken into account these changes in coming to our recommendations.

Both police recruitment and training practices, for example, have been dramatically improved. Today, anyone hired by a municipal police department in Nova Scotia must have a minimum grade 12 education and specialized training at a recognized police academy or five years training with another police force. In 1988, the Provincial Government proclaimed the 1985 amendments to the *Police Act*, which not only established these more demanding recruitment policies, but also required serving officers to continuously upgrade their skills through in-service training courses and programs.

Such training, which was difficult for municipal police departments to require or obtain at the time of the original Marshall investigation, is now available through a variety of sources. The Atlantic Police Academy in Charlottetown provides both basic cadet training and in-service upgrading for serving police officers. The Canadian Police College, which had been providing special technical training courses for Canadian police forces since the 1930s, expanded its mandate for in-service courses during the 1970s. Since then, senior officers in all municipal police forces with 15 or more members have taken management courses offered by the Canadian Police College.

There have been changes in police management as well. The most significant of these changes occurred in 1976 when the Province established the Nova Scotia Police Commission to provide direction and leadership for the province's municipal police departments. Today, the Police Commission is involved in the promotion process in many police departments, as well as assisting with the hiring of everyone from recruits to chiefs in smaller departments.

To illustrate the extent of the changes that have occurred in police training and management in Nova Scotia since 1971, one need only look at the Sydney City Police Department itself. Although its membership has only grown by about 15 percent since 1971, virtually all the new officers hired in recent years have been graduates of the Atlantic Police Academy. The procedures under which they are now promoted were developed in cooperation with the Nova Scotia Police Commission. At the management level, the Department has also become far more sophisticated: it has established a new records and identification system to assist in investigations and the Department itself is now run on team management principles.

The 1985 amendments to the *Police Act* referred to earlier also require municipalities which have their own police force to establish a Board of Police Commissioners, and further, established a provincial Police Review Board to improve the handling of citizen complaints about the police. Finally, in 1988, the Nova Scotia Government established the Department of the Solicitor General to assume responsibility for policing and corrections in the province.

2.6.2 Policing in Nova Scotia

The result of all of these developments is a relatively decentralized system in which municipalities are free to manage their day-to-day policing operations while the Provincial Government provides limited leadership and direction on overall policing concerns. The RCMP operates largely independently of both levels of governing authority in the province.

Under the current system, municipalities in Nova Scotia can choose to operate their own police forces, or they can contract for the services of the RCMP. They can do this directly or by making arrangements with the Provincial Government under the *Police Act* for the RCMP to provide "extended service", which is an extension of the provincial policing service to the municipality in question.

Most municipalities have opted to provide their own police forces. Currently, 26 municipalities operate their own departments, which range in size from forces of just three officers up to 263. Ten municipalities contract for RCMP policing services and six have agreements that provide for RCMP extended service.

The RCMP also provides policing in rural areas and for communities of fewer than 1,500 people. More than 600 officers out of the RCMP's provincial complement of 921 are involved in providing these provincial policing services, while only 61 are involved in providing municipal policing services. Because the RCMP has a special mandate to investigate murders and attempted murders in all except certain urban centres in the province and because it provides - usually without charge - identification and other services to municipal police departments, the RCMP has assumed an even more central role in policing in Nova Scotia.

The RCMP is officially responsible to the Provincial Government under the *Police Act* and the Provincial Policing Agreement. In the municipal policing agreement the RCMP retains a significant degree of control, while at the same time the *Police Act* entrusts the municipality with the responsibility for the maintenance of law and order. Leaving aside the difficulties that could arise in a discussion of the legal status of policing agreements made under the *Police Act*, it is apparent that on a day-to-day basis, the RCMP has traditionally operated relatively autonomously in its relations with governing authorities in Nova Scotia. This aura of independence has been enhanced because it is the police force that is usually asked to conduct reinvestigations of previous criminal investigations or to investigate the operations of municipal police forces.

The Royal Commission's researchers examined how Nova Scotia's policing system operates and considered whether it is appropriate in the context of the number of possible approaches to organizing policing services at a provincial level. At one end of the spectrum they looked at a centralized model, with a single, central authority exercising total control over the entire policing effort. At the other, they considered a decentralized model, with control resting entirely in the hands of local communities. Those who favor the centralized approach argue that it provides for the development of more consistent standards of policing across a province. Those who favor the decentralized approach believe it provides for greater community input, collaboration and control in the policing effort. Nova Scotia has opted for a decentralized system.

After examining the way in which this decentralized system has operated over the years and noting "the overall preference [in Nova Scotia] for local autonomy, variety and choice rather than central direction," the Commission's researchers concluded no radical changes to the system itself are required. "We do not think that there is presently a need for, and we do not recommend, any fundamental changes in the overall structure of the present policing system in the province," the researchers wrote. "We think it has served Nova Scotia quite well in recent years, and may be expected to do so for some time to come." (Volume 2, Page 135)

What is needed, the researchers argued, are more resources and more effective leadership to make the existing Nova Scotia police structure work better for all its citizens. We agree with those conclusions and believe that the Provincial Government must use its existing mandate to provide more effective leadership and direction with regard to policing policy.

Until recently, there has been little evidence of a significant active provincial direction of day-to-day policing in Nova Scotia. The mandate and possibilities were there, but the provincial role was, as described by a senior official in the Department of Attorney General, one of "benign neglect". Municipalities were afforded significant local choice and control, and this has been fully exercised. The Department of Attorney General left municipal policing to the municipalities, and involved itself in policy-making with respect to the RCMP's activities, generally only in response to specific issues that arose from time to time. The Nova Scotia Police Commission was viewed as a means to assist municipalities in fulfilling their policing responsibilities rather than as a resource to influence policy at the provincial level. This narrow view of the role of the Police Commission no doubt contributed to the failure of a number of initiatives undertaken by that Commission and to the erosion of the resources available to it. The reader is directed to Volume 2 for a detailed chronicling of the thwarted efforts of the Police Commission.

Now that Nova Scotia has established a Solicitor General's Department and the 1985 revisions to the *Police Act* have come into force, the Province has assumed a larger mandate and responsibility for policing. At the provincial level, the Solicitor General, the Attorney General, the Nova Scotia Police Commission and the Police Review Board all play a role in policing. As is detailed in the research study, the Nova Scotia Police Commission has not been provided with sufficient resources to do its job. The current Chairman occupies the position on a part time basis, and since 1982, the position of Executive Director has remained vacant. In practice, much of the Police Commission's time has been spent in undertaking investigations into public complaints and disciplinary matters, and in making requested assessments of various municipal police forces. Other activities have included participation in promotion routines, initiatives in standardizing equipment and record systems, the development of training programs, and the licensing of private security agencies and investigators.

The Police Commission has contributed significantly to the development of policing in Nova Scotia. However, major initiatives have not been responded to by the Provincial Government. For example, the "Standard Municipal Police Training Plan" was submitted to Government in 1979. The research study outlines the sorry course that this submission took until 1986 when consideration of the proposed plan apparently just withered and died. Such unresponsiveness leads to demoralized staff with little, if any, incentive to contribute further.

The position of the Police Commission with respect to police services provided by the RCMP has been that these services do not fall within their mandate. This policy no doubt reflected the view of a senior official in the Department of Attorney General on the constitutional difficulties in asserting any provincial supervisory jurisdiction over the federal police force. However well-reasoned this "hands-off approach" may have been, it has meant that the Police Commission has been unable to consider and assess policing throughout the whole province, and has no organized knowledge of public complaints against RCMP officers or the quality of police services provided to contracting municipalities.

The uncertainty surrounding the Police Commission's ambit of responsibility has been compounded by the recent creation of the Solicitor General's Department. This Department was created extremely quickly, with little, if any, thought having been given to a clear breakdown of responsibilties between it and the Department of

Attorney General. As is stated in the research study:

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> ...it was made clear to us that no substantial planning with respect to the new Department and its responsibilities, and no serious consideration of the implications of this decision for the role of the Attorney General and his Department for policing in the province had occurred before the decision was announced. As a result, there appears to be no documentation or planning on the basis of which a realistic assessment can be made of the likely impact the establishment of this new office and Department will have for the fulfillment of the Province's responsibilities with respect to policing in the future.

It is clear that the intention is for the Solicitor General's Department to assume the overall responsibility for provincial policing and correctional matters. Since the Department is still being formed, it is too soon to comment on the manner in which it is carrying out its responsibilties. However, if policing is to be afforded its appropriate priority, the Department must reflect this in its staffing and structures, and the role of the Nova Scotia Police Commission should be recognized and supported.

The research study sets out a number of areas in which the Police Commission can and should be more active. Of particular concern to us are the assessments of municipal police departments and liaison between the Commission and the municipalities themselves and the municipal boards of police commissioners. At present the *Police Act* provides that the Commission may assess the "adequacy, efficiency and effectiveness of police services in the municipality". By the end of 1986, 15 out of 26 municipal police departments had requested such assessments. In our view, the public value of quality police services is such that periodic assessment or accreditation by an independent body such as the Police Commission should be mandatory.

Liaison between the Police Commission and the municipalities and the Department of Municipal Affairs is important if a rational basis for the funding of police services is to be developed. At present, municipalities receive unconditional grants from the Province. The municipalities are free to use these grants for whatever purposes they see fit, and accordingly, a grant may or may not be used to contribute to policing costs. There is virtually no direct provincial assistance for policing. The funding of municipal police services is, not surprisingly, a source of dissatisfaction among many municipalities. The different methods through which policing can be obtained, and the perceived inequities which result when larger centres in effect must police a higher population than that on which their grant is based, suggests clearly that a more rational basis for funding police services is needed.

At the municipal level itself, we believe there is a need for more active management, and for greater openness by and between boards of police commissioners. One way to strengthen the management of policing from the point of view of resources, quality control and community input would be to have regular annual meetings of local police commission boards held under the auspices of the Police

Commission. This structure would provide a forum for exchange of experience and ideas and facilitate long-term planning and finding solutions to common problems. Regular meetings of the chairs of municipal police department boards should also lead to more direct collaboration among municipal police departments.

We believe policing matters should also play a more prominent role in the deliberations of the Union of Nova Scotia Municipalities. This would help ensure that municipalities would be active policing policy-makers and that the significance of municipalities in the Nova Scotian policing system would not be dwarfed by the more expansive role the Province will be assuming.

One special concern in the overall municipal and provincial policing partnership concerns the relationship of both levels of government to RCMP policing in the province. Lack of accountability of the RCMP to provincial and municipal authorities has led elsewhere to calls for a provincial police force. Both municipal authorities and the Province must become more forceful about defining the relationship. At our peer review workshop to discuss the police research (see Volume 2, Appendix I), RCMP officials from Ottawa invited such input: "Let the Province develop a plan and we'll respond." The Province should take up that challenge.

Most municipal policing authorities have accepted - and the rest should be encouraged to do so - the guidelines on the role of such boards suggested by the Nova Scotia Police Commission in 1982. Those guidelines state that while the local board established by the municipality may set policy, day-to-day operations should remain under the control of the Chief of Police; that the Chief and his subordinates are sworn servants of the Crown, not of the governing authority; and that, while the governing authority must refrain from interfering with criminal or quasi-criminal charges or enforcement of particular statutes, it can and should offer advice to the Chief concerning enforcement priorities so that they will "reflect community needs" (Police Commission, 1982, p. 10).

Recommendation 46

We recommend that the Police Commission be provided with sufficient resources to enable it to fulfill properly the leadership, training, information and assessment roles that constitute its mandate. Such resources should include funding for:

(a) *restoring the position of Chairman of the Police Commission to a full time position;*

(b) *the appointment of four part time Commissioners who are broadly representative of community and public interest in policing;*

(c) *the appointment of an experienced Executive Director whose responsibilities will include Research, Information and Statistics; Training and Personnel Development; Advisory Services; and Security.*

Recommendation 47

We recommend that the Police Commission conduct regular assessments of the operations of each municipal police department in accordance with the provisions of the Police Act.

Recommendation 48

We recommend that the Solicitor General require the RCMP to provide information concerning RCMP operations in the province to the Police Commission on an ongoing basis so the Commission can develop and plan rational policing policy and an adequate police information system in the province.

Recommendation 49

We recommend that the Police Commission develop and maintain close liaison with officials in the Department of Municipal Affairs and the Executive of the Union of Nova Scotia Municipalities with a view to developing a more rational basis for provincial financial assistance for municipal policing services.

Recommendation 50

We recommend that the Police Commission not be absorbed into the mainline structure of the Solicitor General's Department to keep it relatively independent of political considerations and to better reflect the municipal-provincial partnership that characterizes the Nova Scotia organization of policing services.

Recommendation 51

We recommend the establishment within the Solicitor General's Department of an Executive Director (Policing) to reflect its increasing role in policing in the province.

Recommendation 52

We recommend that a regular annual meeting be held by the Police Commission with the chairs of all Nova Scotia boards of police commissioners. The purpose would be to provide a forum for information exchange, program development and possible collaboration among municipal police departments in various matters, from equipment to crime prevention.

2.6.3 Police Review Board

The 1985 amendments to the *Police Act* created a new Police Review Board to hear and determine public complaints and review matters of internal discipline against police officers. These amendments largely followed the recommendations of Judge Nathan Green in his 1981 report on the *Police Act*. Whether or not this new Board will be effective will depend on the ability of its members to be and be seen to be independent of both Government and the police community. This independence should be fostered by a clear separation between the Board and the Nova Scotia Police Commission. We understand that the Chairman of the Police Commission is to be the Registrar of the Board, the investigative branch of the Commission will conduct investigations for the Board, and the budget of the Board will be part of that Commission. While we have commented earlier on the desirability of the independence of the Commission itself, we believe that linking the Police Review Board to the Police Commission in the manner proposed will lessen the confidence of the public and the police in the Board. When dealing with individual complaints and the rights of individual police officers, it is essential that the adjudicative body not be perceived as being aligned with one side or the other. Even though the Police Commission may itself be independent, it is inevitable that it will be viewed as being management or police oriented, and hence neither a private complainant nor a disciplined officer may feel that he or she has been treated impartially. We believe that in its essential aspects the Police Review Board should be separate from and independent of the Nova Scotia Police Commission.

Recommendation 53

We recommend that the Chairman of the Nova Scotia Police Commission not act as the Registrar of the Police Review Board, and that the Nova Scotia Police Commission not provide investigative services to the Police Review Board.

2.6.4 Working relationship between local boards and police forces

In 1982, the Nova Scotia Police Commission published guidelines setting out the proper role and responsibility of a local board of police commissioners. Those guidelines state that while the local board established by the municipality may set policy, the day-to-day operations should remain under the control of the Chief of Police; that the Chief and his subordinates are sworn servants of the Crown, not of the governing authority; and that, while the governing authority must refrain from interfering with criminal or quasi-criminal charges or enforcement of particular statutes, it can and should offer advice to the Chief concerning enforcement priorities, so that they will "reflect community needs" (Police Commission, 1982 at p. 10). Most municipal policing authorities have accepted these guidelines. However, given the dominance of municipal police governing authorities by elected politicians, there is, we believe, a need for clear legislative prohibitions against personal interference in the running of police forces by individual councillors or other officials. Police chiefs should only receive directions or instructions which emanate from their governing authorities acting in their corporate capacity; police officers should only receive directions and instructions from their senior officers.

Recommendation 54

We recommend that the Police Act *be amended to make it clear that it is unlawful for anyone other than a police officer of the same force to issue any order, direction or instruction to any member of a police force relative to his/her duties as a member of the force, except when communicating a decision of the force's lawful governing authority, and that a governing authority shall only issue such order, direction or instruction to the Chief or someone who is acting in his or her stead.*

2.6.5 Relationships with visible minorities

One reason Donald Marshall, Jr. was wrongfully prosecuted in 1971 is because of the antipathy, lack of trust and lack of meaningful communication that existed between the police and members of the Native and Black communities. Their negative assumptions and expectations about one another clearly shaped the way events subsequently unfolded.

In the 18 years since, the adoption of the *Canadian Charter of Rights and Freedoms*, the establishment of such government-appointed and funded monitoring agencies as the Nova Scotia Human Rights Commission, and significant improvements in police training itself have all provided increased protections from discrimination against minorities in the criminal justice system. We hasten to add, as clearly pointed out in the research study, that an exercise of police power against any particular social category which varies from its representation in the population, does not necessarily of itself imply a negative attitude against such a group. There are a number of complex sociological factors involved, and it is simplistic to conclude that this proportional use of police authority is a direct result of discrimination by police.

Research carried out for this Commission, however, indicates Nova Scotians - and not just Black and Native Nova Scotians - still believe Blacks and Natives are not treated fairly by the police.

There are good reasons for this perception. There are only 11 Blacks and one Native on Nova Scotia municipal police forces, and there are no Blacks and only one Native in the RCMP in Nova Scotia. (Volume 2, Page 103)

While there will probably never be a large number of minority group members on local police forces simply because of their small numbers in the larger society, we believe there must be a serious effort to encourage more members of visible minorities to become police officers. It is simply unacceptable for police force managers to suggest qualified minority members are not interested in applying. Surely, it is the job of management to develop effective recruitment programs.

There are a number of ways to accomplish this goal - affirmative action programs to hire and promote minorities; "fast-tracking" or accelerated promotions to assist members of certain disadvantaged groups advance through the ranks more quickly; and lateral entry, which is the practice of hiring new police officers at a rank between the usual entry level police constable position and chief.

For many reasons, including the implications such policies may have on police organization, we believe an affirmative action program is the most logical and practical step to quickly increase the numbers of minority group members on municipal police forces.

Recommendation 55

We recommend that the recruitment of visible minority group members be actively encouraged by both police and governing authorities. Both the RCMP and municipal police departments in the province should establish specific recruitment targets which reflect the distribution of the visible minority groups in the population.

Recommendation 56

We recommend that particular attention be given to using outreach recruitment methods (for example, having visible minority officers involved in recruitment; building up contact with minority communities to facilitate recruitment). The guidelines prepared by the Greater Toronto Region Working Group on Policing in Multicultural, Multiracial Urban Groups on the recruitment and selection of visible minority police officers should be circulated to all relevant police organizations in the province.

Recommendation 57

We recommend that action be taken to get members of visible minorities into police management positions.

Regardless of the success of such programs, of course, most police officers will continue to be White. They must be aware of and sensitive to minority group concerns. But too few police managers yet recognize that police officers require training in dealing with minority communities. For instance, despite what happened in the Marshall case, and despite the presence of the Membertou Reserve and a significant number of Blacks within its jurisdiction, the Sydney City Police Department has never sent a single officer to the Atlantic Police Academy's race relations and multiculturalism course. (Transcript, Page 14276) Although there may be understandable reasons for this - with scarce resources available, municipal police departments may opt to take advantage of other in-service courses - there seems to be limited awareness among municipal police departments generally that there is a problem in dealing with racial minorities and a correspondingly weak commitment to resolve it. Unfortunately, that also appears to be true for the local police boards that oversee municipal police departments, and for the Nova Scotia Police Commission as well.

Because the small proportion of Natives and Blacks in the Nova Scotia population makes it doubtful there will ever be a "critical mass" of such minorities in any one police department to act as a potent advocacy force for change, we believe emphasis should be on the education, basic training and regular in-service training of all police officers.

Very little, if any, such education and training pertinent to race or ethnic considerations now occurs in police departments in Nova Scotia. The Atlantic Police Academy, for example, has modified its cadet curriculum, steadily enlarging its coverage of human relations materials and developing some interesting initiatives to improve communication between police and visible minorities. (Volume 2, Page 108) But the Director of the Academy told a Royal Commission forum that while race relations and multiculturalism courses are "on the books" at the Academy, they have seldom - if ever - been taught as part of the in-service program for police officers. The reason: few officers sign up for them. Even in the basic Atlantic Police Academy curriculum, little time is set aside for consideration of such topics.

The task of educating and training police in multiculturalism or racial and ethnic awareness and sensitivity cannot be taken on half-heartedly. Several experts invited to the special forums suggested that if it is only minimal and not encouraged by a real commitment from municipal police departments and the Police Commission, such training may worsen rather than improve the situation.

But because education and training are not a panacea, and because minority concerns may not be well expressed within police departments because of the small numbers of minority group members, we believe there must be other ways for minorities to have input into police departments and policing policies. This may be at the level of police advisory boards - the Halifax Police Department has set up community advisory boards in each of its three policing zones, for example - and/or the Nova Scotia Police Commission or similar body. The reason for this recommendation, quite simply, is that we believe there is a great need for police departments and visible minority groups to have more regular, everyday contact in order to develop a better mutual understanding.

Recommendation 58

We recommend that the Nova Scotia Police Commission take a strong leadership role in police/visible minority relations by providing useful materials to departments (comparable in quality to those now made available to its officers by the RCMP), arranging imaginative in-service training in conjunction with the Atlantic Police Academy or similar bodies, and assisting departments in the setting up of race relations liaison officers or committees.

Recommendation 59

We recommend that, together with the Nova Scotia Police Commission, municipal police departments and local boards of police commissioners develop imaginative outreach programs and liaison roles in order to provide visible minorities with greater access to and more positive interaction with the police.

Recommendation 60

We recommend that municipal police departments adopt as an objective the eradication in police departments of racial slurs and stereotyping, and in pursuit of this objective promulgate official policies and guidelines on stereotyping similar to those currently employed by the RCMP (RCMP Administration Manual III.9) or the Metropolitan Toronto Police Force (standing order number 24).

Recommendation 61

We recommend that special attention be given to more intensive training for cadets whose first assignment will be in areas of high visible minority concentration. In addition, detachments and municipal police departments located in areas of high visible minority concentration should allocate proportionally more of their resources to multicultural and race relations training. The Police Commission should monitor detachment and municipal police department performance in this area.

Recommendation 62

We recommend that education and sensitivity training with respect to visible minorities be more pronounced in the cadet training curriculum and should be a component of regular in-service training.

Recommendation 63

We recommend that the Atlantic Police Academy be encouraged to continue to develop in-service programs and imaginative experimental initiatives for police/visible minority interaction.

2.6.6 Police training and promotion practices

Police officers in Sydney in 1971 were poorly trained. Promotion was based more on seniority and informal considerations than on explicit promotion routines and merit criteria.

Many of the inadequacies of their 1971 police investigation, including their failure to secure the crime scene, to seek out witnesses, to take statements and to collect such potentially important pieces of evidence as the victim's clothing can all be attributed, at least in part, to these poor training and promotion practices.

Chief Richard Walsh noted at our hearings that a Sydney Police Department recruit in those days was basically given a flashlight and a set of handcuffs and sent on his way, learning the job by association with more senior constables and by trial and error. The police department had no investigative manuals detailing appropriate behavior, no clear promotion guidelines and paid no attention to in-service training.

Certainly the Sydney police were not unique among Nova Scotia municipal police departments at that time. But our research has established that the current situation in Sydney - as well as more generally in municipalities across the province - is significantly better now. (See Volume 2, Page 7)

The recruitment process and training has improved significantly. The recently proclaimed amendments to the *Police Act* set out more stringent criteria for hiring officers, requiring either cadet training through the Atlantic Police Academy, equivalent "certified" training, or five years experience with another police force. Our research indicates that the quality of cadet training at the Atlantic Police Academy - including curriculum, length of training, staff and field training - compares adequately with that provided in the RCMP. (Thirty-five of the Sydney Police Department's current members, in fact, are Atlantic Police Academy graduates.)

Officers from municipal police departments have also significantly narrowed the gap between themselves and RCMP officers in terms of the number of in-service courses taken.

Finally, promotions in Nova Scotia municipal police departments also appear to be more merit-based and open to formal competition. Larger departments now have detailed promotion routines. In the case of small departments, the Nova Scotia Police Commission has prepared promotion routines and increasingly supervises their implementation. Indeed, the Police Commission has become involved in the selection of recruits and even chiefs, especially in smaller municipalities. However, no evaluation has yet been done to find out the extent to which municipal police departments have actually adopted the more effective and merit-based promotion procedures. Promotion criteria and practices should be reviewed so that citizens can be assured that the most qualified and suited are in fact promoted.

Even where such guidelines are used, however, little training and job preparation is provided for newly promoted officers as part of their promotion. This is significant since developing good management practices is clearly as important as having qualified personnel and merit-based "routines". The credentials and quality of the management of departments themselves must be assessed regularly.

We note that the recently established provincial Solicitor General's Department has struck task forces to examine the value and cost of the training offered by the Atlantic Police Academy, and to consider the training requirements of municipal police departments. We believe this offers an opportunity to consider both the quantity and quality of training.

It is our view that training budgets continue to be inadequate and in-service training and regular programs of upgrading and certification are still woefully undeveloped. Although there is evidence police officers themselves want more training, many of their employers offer only limited opportunities. In fact, many experienced Nova Scotia police officers, especially - but not only - in the smaller municipal police departments, have still not even received the level of formal training now required of new cadets.

In terms of policing, we believe more courses and programs dealing with ethics, multiculturalism and management training seminars should be stressed since evidence suggests that courses such as traffic-control issues and general investigation are both more readily available and more utilized. At the same time, we believe that all officers - not just a few community relations specialists - should receive better training in race and ethnic relations, crime prevention, community problems and so forth.

Police cadets should also get more exposure to minority citizens in many different settings as part of their training, and should be encouraged to mix with non-police students during their formative training.

There should also be better, more in-depth training with respect to rights and freedoms and the use of force. The "force continuum" program (recently developed by the Nova Scotia Police Commission) is commendable, but thus far it has largely focussed on the use of mace and firearms, and standards are set only by local departments.

Some resource-strapped municipalities have recently attempted to ease their financial problems by hiring more part time and volunteer personnel, virtually all of whom get only minimal training.

Recommendation 64

We recommend that guidelines be developed by the Police Commission with respect to the use by municipal police departments of part time, volunteer and auxiliary personnel.

Recommendation 65

We recommend that routine promotion guidelines be established in all municipal police departments. In all but the largest municipal police departments the involvement of the Police Commission and/or outside consultants should be required.

Recommendation 66

We recommend that in all but the largest municipal police departments the involvement of the Police Commission and/or outside consultants be required in the selection of the chief of police.

Recommendation 67

We recommend that more training be provided for those promoted to supervisory and management positions in the municipal police departments. Training in courses on supervision and executive development should accompany such promotion.

Recommendation 68

We recommend that the Solicitor General's Task Force on Municipal Police Training, as well as the data collected as part of the Police Study for this Report, be used to establish an ongoing system for monitoring levels of training in the province. The system should be maintained by the Police Commission or equivalent body and should incorporate clear definitions of the types of training appropriate for the needs of particular members, departments and detachments.

Recommendation 69

We recommend that periodic assessment of municipal police department officers be carried out as in Nova Scotia's recently announced "force continuum program" which deals with the use of firearms and mace. Common standards should be developed for certification in these areas and consideration should be given to the inclusion of physical fitness and basic response/preliminary investigation imperatives.

2.6.7 Investigative practices

As we have already noted, police investigative practices in the Marshall case were often woefully inadequate. There were many reasons for this.

Some aspects of the poor investigations reflect, at least in part, police thinking and practice at the time. For example, the fact that patrol officers failed to secure the scene or look for witnesses or suspects may simply have been the result of what was a sharp division of responsibility and authority between uniform and detective units in many departments at the time. One officer of the day described the patrol and detective sections in the Sydney City Police Department as "two different worlds completely". (Transcript, Page 1193)

Research indicates there has been some improvement on most of the investigative shortcomings we have noted here and in the findings section of our Report. Police investigative training has improved, investigative resources are greater, autopsy procedures are in place, the *Young Offenders Act* and the *Canadian Charter of Rights and Freedoms* provide better protection for accused people and witnesses, and police management style appears to be changing.

Our study indicated, for example, that Nova Scotia municipal police department officers have taken 148 in-service investigative courses in the past three years alone (Volume 2, Page 112), and that there is now a reasonable match between investigative resources available and the distribution of serious crimes in Nova Scotia. (Volume 2, Page 114) In cases of murder and attempted murder, the RCMP will conduct the investigation other than in Bedford, Bridgewater, Dartmouth, Halifax, Sydney and Truro. Further, it is evident that there is a high degree of informal cooperation between RCMP and the various municipal police departments in the provision of back-up personnel and specialized services such as identification, dogs and security surveys.

Despite these improvements and the availability of RCMP assistance, concerns remain over the consistency of municipal investigative capacities and practices. Efforts must be made to work towards a more consistent approach, so that a more uniform quality of investigative work will exist throughout the province.

Particular attention must be paid to controlling the manner in which juveniles and other persons deserving particular assistance are treated by police investigators. It will be recalled that we expressed significant concern over the manner in which juvenile witnesses were treated in the Marshall case.

Research studies have shown that by suggesting words, "promising" concessions or trade-offs and employing other interrogation strategies, an interrogator can greatly influence testimony (Ericson and Baranek). But research has also indicated there are ways to reduce potential improprieties. Audio-visual taping of police interviews, for example, especially in the case of serious crimes or in situations involving young and vulnerable subjects, has been shown to be valuable. (Grant; Law Reform Commission of Canada)

While a few police jurisdictions now take advantage of high technology equipment, including audio-visual resources for video-taping police interviews, even some of the larger municipal police departments lack such equipment. Despite that, a majority of the police chiefs surveyed by our researchers considered their investigative resources adequate. (Volume 2, Page 115)

Recommendation 70

We recommend that all constables be required to have basic investigative skills such as would be required to secure the crime scene and carry out proper preliminary recording and investigation.

Recommendation 71

We recommend that municipal police departments cooperate with the Police Commission to produce a uniform set of guidelines for investigative work.

Recommendation 72

We recommend that the Police Commission undertake a systematic evaluation of the investigative capacities available in all municipal police departments in the province. This evaluation should be coordinated with periodic reviews of the municipal police departments.

Recommendation 73

We recommend that the current standing directive on municipal police department responsibilities for the investigation of murder and attempted murder be regarded as a flexible directive which may change to reflect alterations in municipal police department investigative capacities. This may involve broadening the scope of *exemptions, or it may lead to the inclusion of other serious crimes in the list of offences which some municipal police departments may not be able to handle.*

Recommendation 74

We recommend that in cases where suspects and/or witnesses are juveniles or mentally unstable, investigating officers make special efforts to ensure they are treated fairly. Supportive persons from the witness/suspect viewpoint should be present during interviews.

Recommendation 75

We recommend that audio-visual recording of police interviews of chief suspects and witnesses in serious crimes such as murder, and of juveniles and other interviewees who may be easily influenced, be encouraged.

2.6.8 Management and control

During our investigation, we were especially troubled by the failure of other police officers or police management to question or criticize improper aspects of the investigation, including the interrogation of young and vulnerable witnesses and the preoccupation by MacIntyre with one possible version of the event to the exclusion of other possibilities. We have already detailed those aspects of the investigation which were not acceptable.

Neither the Sydney City Police Chief nor his Deputy apparently took any interest in monitoring the ongoing investigation. When MacIntyre was asked in his testimony who was responsible for the investigation, his reply was telling: "Just me and any...anybody that was with me". (Transcript, Page 6076) It is our view that had MacIntyre's investigation been subject to a thorough periodic review by competent superiors, avenues pointing to Marshall's innocence would have been explored and Marshall may not have been charged. We note that such a periodic review is standard practice in RCMP investigations and we see no reason why it should not be so in municipal police departments.

Given the rising costs of police services, the growing demand for a wider range of quality police services and the stagnant tax base in many Nova Scotian municipalities, municipal police departments and their governing authorities must work to develop modes of cooperation to overcome their limited resources.

We believe that the Province, through the Department of the Solicitor General, must carry through on announced intentions to examine the delivery of police services in Nova Scotia. Recent developments in the Halifax metropolitan area where the Bedford, Dartmouth and Halifax Police Departments collaborated in cost-sharing sophisticated computer technology, illustrate that much can be done short of formal regionalization.

We are aware that in 1982 a major study on regionalization was completed at the request of the Joint Expenditure Board of the County of Cape Breton. The costs of a regional police force for Cape Breton County were outlined, together with the advantages and disadvantages of regionalization. However, the absence of a significant financial incentive from the Province and the voicing of serious opposition by some local politicians, the regional concept was not being pursued. We believe, however, that the merits of regionalization should again be seriously considered and debated, and that concerns over local autonomy should not be allowed to thwart what may otherwise be a means of obtaining a more effective and efficient policing service.

While this Royal Commission was proceeding, several smaller municipalities made decisions concerning whether they would have contracted RCMP services or a local, independent force in the future. The main criterion in each of these situations appeared to be the amount of resources each municipality could or would muster.

This is understandable, but affordability cannot be the only criterion in determining the kind of police force a municipality should have. We believe the Province has an obligation not only to establish minimum standards for policing, but also to provide municipalities with the resources to meet the implied financial obligations that go with such standards.

Recommendation 76

We recommend that it be standard practice in all police departments for superiors to review, with investigators, the progress of investigations of all serious offenses.

Recommendation 77

We recommend that a joint task force be established by the Solicitor General and the Minister of Municipal Affairs, with representation from the other relevant bodies, to examine the organization and delivery of policing services within the province, and in particular, to consider and review the desirability and feasibility of some regionalization of existing municipal policing services in the province, and to make recommendations to the Government on these matters. Such a review should also examine other less comprehensive collaborative arrangements which might beneficially be established or further developed between existing municipal police forces and the RCMP to improve the quality and efficacy of the delivery of policing services in the province.

Recommendation 78

We recommend that all municipal police departments be able to deliver police services according to a set of minimum standards for policing in Nova Scotia. This set of standards should be developed by the Police Commission with appropriate input from both provincial (Solicitor General) and municipal (local police commissions) governing authorities. Recognizing that the primary responsibility for delivery of police services is with the municipalities and that it may be beyond the financial capability of some to upgrade their municipal police department according to these minimum standards, the Province must ensure that the municipal police departments have the resources to meet the prescribed standards.

2.6.9 Organization and management of policing

Local municipal police departments throughout Nova Scotia are, by reason of their structure, more politically responsive at a local level and have more potential for effective community input than does a national police force such as the RCMP. This is not to say that local police forces and the RCMP cannot and do not provide a good mix of police services throughout Nova Scotia. We have commented that the cooperation and relationship between the local forces and the RCMP is generally good and has resulted in a more widespread availability of police services. However, the focus of most local municipal police departments in responding quickly to local concerns leads to a lessening of emphasis on long-term planning and on systematic evaluations or audits of their performances. If police organization and management is to be improved, all municipal police departments should have more deliberate planning processes and more effective monitoring of the successes and failures of whatever plans are developed. The planning process should involve the specification of departmental goals and priorities and should lead to the construction of an objective set of standards by which performance of individuals, and the department as a whole, can be assessed.

In order to improve police organization and management, all municipal police departments should first establish a clear definition of departmental goals and priorities, a formal system of job descriptions, and job standards and appraisal systems for evaluating job performance.

Recommendation 79

We recommend that municipal police departments establish departmental plans which include a clear definition of departmental goals and priorities, and appraisal systems for evaluating job performances.

Equally important is that good internal management practices be developed to accomplish departmental goals and standards so that they are not simply nice words posted on the bulletin board. Goals and objectives, feedback and participation, the establishment of management teams - such a corporate management style can be developed without threat to the rank structure.

Recommendation 80

We recommend that priority be given to improving police management systems among the municipal police departments, focussing on greater communication, feedback and accountability among departmental members.

Municipal police departments would also be well-advised to adopt the remarks Mr. Justice Rand made about prosecutors - "The role [of the police] excludes any notion of winning or losing; his function is a matter of public duty" - to apply to themselves. Preoccupation with getting "the collar" or "nailing the bad guy" often stimulated by real or perceived public pressure can clearly lead to unethical police behavior and miscarriages of justice.

Recommendation 81

We recommend that municipal police departments be encouraged to develop a code of ethics as positive guidelines for behavior. For purposes of continuity and consistency and for minimum standardization, such codes should be developed in consultation with the Atlantic Police Academy and the Police Commission.

2.6.10 Police reinvestigations

What happens when one police force is called upon to investigate the actions of another, especially when those forces are called upon to cooperate in other cases? In the Marshall case, there were two instances where the RCMP were called upon to reinvestigate the actions of their fellow police officers in Sydney. A senior RCMP officer has acknowledged he "botched" the first investigation because he rubber-stamped the Sydney City Police Department's initial effort. Although the second reinvestigation did uncover the injustice of the original investigation, it too was tentative and limited in its pursuit of wrongdoing and shortcomings by the Sydney City Police Department. RCMP who testified acknowledged that they were concerned about damaging their relationship with a fellow police force.

We appreciate that there is a need for ongoing cooperation between the various RCMP detachments and local police forces. We also realize that among the municipal police forces in the province there is an intangible association which may make it difficult for one force to review the work of another. The Commission is convinced that any such reinvestigation must be conducted by a police force that is removed both geographically and professionally from the force which conducted the initial investigation. In our view, this means that in situations involving a municipal police department, any reinvestigation should be conducted by the RCMP, with out-of-province officers being called upon if necessary.

Regardless of who conducts the investigation, however, the mandate and procedures must be clear. Beyond this, there should also be some mechanism for independent review of such investigations and reinvestigations.

Recommendation 82

We recommend that guidelines be developed by the Solicitor General and Attorney General Departments detailing procedures to be followed where it is necessary for there to be a reinvestigation of the work of a police force. Any such reinvestigation of the work of a municipal police department should be conducted by the RCMP, with out-of-province assistance if required. All reinvestigations should be thoroughly reviewed by the Department of Attorney General.

2.6.11 Conclusions

Volume 2 of this Report contains the full text of the research on policing in Nova Scotia conducted for this Commission. It contains many detailed recommendations dealing with the Solicitor General, municipal police departments, etc., which we commend to both the Provincial Government and police departments for their consideration.

The recommendations we have made in the preceding pages should help to effect a better, more accountable policing system in Nova Scotia.

With significant leadership provided by the new Solicitor General's Department, stronger municipal involvement and collaboration, an adequately empowered, independent Police Review

Board and a considerably strengthened Police Commission removed from direct political influence, the Nova Scotian policing system should flourish.

The Nova Scotian police system is a hybrid of municipal and provincial control with a significant federal presence as well. This complex system is based on the principles, not well nor often articulated, of municipal-based policing and provincial leadership and coordination.

While there are weaknesses to such a system - lack of financial resources, the variability of practice and the vulnerability of policing standards - we believe these can be overcome if the Provincial Government is prepared to provide the resources, standards and monitoring required to ensure high calibre policing for all Nova Scotians. If provincial leadership and coordination is present, there are many advantages to a policing system that is primarily responsible to and controlled at the local community level. One of the most important of these advantages might ultimately be the development of a shared view by all Nova Scotians that effective policing is a public enterprise worthy of their attention and support.

Part 3
Summary of Findings

1.1
Introduction

We find:

- that the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to - and even beyond - his acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983.

- that this miscarriage of justice could have and should have been prevented if persons involved in the criminal justice system had carried out their duties in a professional and/or competent manner.

- that Marshall was not the author of his own misfortune.

- that the miscarriage of justice was real and not simply apparent.

- that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment.

1.2
The Incident

We find:

- that Sandy Seale was not killed in the course of a robbery, attempted robbery, mugging or rolling.

- that Donald Marshall, Jr. told the truth about the events surrounding the stabbing when first interviewed by the Sydney City Police on the night of the incident.

- that Seale and Marshall met by chance following the dance.

- that Ebsary and MacNeil initiated the contact with Marshall and Seale.

- that Ebsary, MacNeil, Marshall and Seale engaged in a conversation that lasted for several minutes.

- that the stabbing was the result of Ebsary's violent and unpredictable character.

1.3
The Police Response

We find:

- that the immediate police response to the stabbing was entirely inadequate, incompetent and unprofessional.

- that the subsequent MacIntyre investigation was inadequate, incompetent and unprofessional.

- that MacIntyre, without any evidence to support his conclusions and in the face of evidence to the contrary, had identified Marshall as the prime suspect by the morning of May 29, 1971 and concluded that the incident occurred as the result of an argument.

- that the fact that Marshall was a Native was one of the reasons MacIntyre identified him as the prime suspect.

- that MacIntyre accepted evidence that supported his conclusion and rejected evidence that discounted that conclusion.

- that MacIntyre should not have ignored the statements given by George and Sandy MacNeil, which described two men fitting the descriptions given by Marshall in the park at the time of the incident.

- that MacIntyre failed to pursue efforts to locate the two men Marshall had described as being involved in Seale's killing.

- that the Sydney City Police Department should have taken advantage of the investigative facilities and services available from the RCMP.

- that an autopsy should have been performed on Sandy Seale.

- that the information in John Pratico's statement of June 4, 1971 resulted from suggestions MacIntyre made to Pratico.

- that MacIntyre's interview with Maynard Chant was conducted in an intimidating and unacceptable manner.

- that the information in Chant's statement of June 4, 1971 concerning a dark-haired fellow in the bushes, an argument, and Marshall stabbing Seale, resulted from suggestions MacIntyre made to Chant.

- that Urquhart did not crumple up and throw away Patricia Harriss' partially completed statements.

- that Harriss used information given to her by someone else in providing the first story she told police.

- that Urquhart, although a secondary player in the MacIntyre investigation, had a responsibility to speak out when the investigation was being conducted improperly.

- that Robert Patterson was found by Sydney City Police and questioned but no statement was taken.

1.4
Trial Process

We find:

- that the Crown prosecutor and the defence counsel in Donald Marshall, Jr.'s 1971 trial failed to discharge their obligations, resulting in Marshall's wrongful conviction.

- that the Crown prosecutor, in view of the conflicting statements before him, should have interviewed all of the key witnesses separately prior to trial.

- that the Crown prosecutor should have disclosed the contents of prior inconsistent statements to the defence.

- that defence counsel failed to provide adequate professional representation in that they did not arrange for any independent investigation, interview Crown witnesses or seek disclosure of the Crown case.

- that defence counsel were aware of the existence of prior statements by Chant, Pratico and Harriss but did not request them.

- that the trial judge misinterpreted the *Canada Evidence Act* in refusing to permit a thorough examination of Pratico's comments outside the courtroom.

- that the cumulative effect of incorrect rulings by the trial judge denied Marshall a fair trial.

1.5
1971 RCMP Review

We find:

- that the Crown prosecutor in Sydney, Donald MacNeil, and the Attorney General's office in Halifax failed to discharge their duties because they did not disclose the existence of important new evidence to counsel for Marshall in November 1971.

- that Robert Anderson, the Director (Criminal) in the Department of Attorney General should have instructed his Crown prosecutors to bring the evidence to the attention of Marshall's counsel.

- that the RCMP review failed to uncover Donald Marshall, Jr.'s wrongful conviction because of Inspector E. A. Marshall's incompetent investigation into Jimmy MacNeil's allegations.

1.6
Appeal Process

We find:

- that counsel for Donald Marshall, Jr. failed to put arguments before the Court of Appeal concerning fundamental errors of law during the trial, and that this failure represented a serious breach of the standard of professional conduct expected and required of defence counsel.

- that the Crown's case should not have been handled by a junior lawyer in the Department.

- that Crown counsel should have raised the issue of the trial judge's erroneous rulings when defence counsel failed to do so.

- that there should have been greater cooperation between local Crown prosecutors in Sydney and the lawyers handling the appeal in the Department of Attorney General in Halifax.

- that the Court of Appeal had a duty to review the complete trial record and ensure that all relevant issues were argued.

- that the errors by the trial judge were so fundamental that a new trial should have been the inevitable result of any appeal.

1.7
The 1974 and 1975 Reviews

We find:

- that Constable Gary Green acted properly in providing information regarding Donna Ebsary's evidence to the Sydney City Police Department, and that he cannot be faulted for failing to investigate the matter further.

- that Urquhart was remiss in his duties when he failed to follow up on new evidence indicating that Donna Ebsary had seen her father with a blood-stained knife on the night of Seale's murder.

- that the RCMP did conduct a file review of the Marshall case in 1975 and that while little is known about its purpose or results, it is clear that the Sydney City Police Department cooperated with the RCMP in the 1975 review.

1.8
The 1982 Reinvestigation

We find:

- that Staff Sergeant Wheaton and Corporal Carroll should have been more circumspect in questioning Marshall in Dorchester about what happened on the night of the murder.

- that Chief MacIntyre did not deliberately attempt to hide any documents from the RCMP investigators.

- that the Department of Attorney General did not interfere with the RCMP investigation.

1.10
Setting up the Reference

We find:

- that it is regrettable that the Attorney General of Canada was influenced by Chief Justice MacKeigan's views in his decision to hold the Reference under Section 617(b) [now Section 690(b)] of the *Criminal Code* rather than Section 617(c) [now Section 690(c)].

- that the decision to proceed under Section 617(b) precluded a complete examination of why the wrongful conviction occurred.

1.11
Reference Decision

We find:

- that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.

- that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.

- that the Court took it upon itself to "convict" Marshall of a robbery with which he was never charged.

- that the Court was in error when it stated that Marshall "admittedly" committed perjury.

- that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.

- that the Court's suggestion that Marshall's "untruthfulness … contributed in large measure to his conviction" was not supported by any available evidence and was contrary to evidence before the Court.

- that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.

- that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.

- that the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

- that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.

1.12

Donald Marshall, Jr. and the Attorney General's Department

We find:

- that Donald Marshall, Jr. was not treated properly by the Attorney General's Department.

- that Gordon Coles should not have attempted to persuade Frank Edwards not to urge the Court of Appeal to acquit Marshall.

- that Edwards is to be commended for refusing to back down in his position in favour of arguing for the Court to acquit Marshall.

- that Edwards acted improperly in arguing before the Court of Appeal that the criminal justice system was not in any way responsible for Marshall's wrongful conviction, a position he knew was not supported by the facts.

- that Coles failed to do any research before advising the Attorney General not to appoint a public inquiry into the Marshall case.

- that Coles' failure to take any positive action to determine why Marshall had been wrongfully convicted is inexcusable.

- that Coles and Martin Herschorn failed to review any of the relevant documents before refusing a *Freedom of Information Act* request for them from Marshall's counsel.

- that Coles' unilateral correspondence with counsel to the Campbell Commission was improper.

- that Coles should have considered whether it was appropriate for the Province to approach the compensation process in the Marshall case simply with an eye to achieving the best possible financial deal for the Province.

- that the Court of Appeal's gratuitous references to Marshall's responsibility for his own conviction were a factor in determining the amount of compensation paid to him.

- that the compensation paid to Donald Marshall, Jr. was only for the period of time Marshall spent in jail.

Part 4
Summary of Recommendations

Righting the Wrong: Dealing with the Wrongfully Convicted

1. Review body	We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism - an individual or a body - to facilitate the reinvestigation of alleged cases of wrongful conviction.
2. Powers of review body	We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.
3. Judicial Inquiry to consider compensation claims	We recommend that when a person is found to have been wrongfully convicted, a judicial inquiry be constituted to consider any claim for compensation. The person or persons appointed to this inquiry should be completely independent of any involvement with the administration of justice in the province which gave rise to the wrongful conviction.
4. No limit on compensation amount	We recommend that there be no pre-set limit on the amounts recoverable with respect to any particular claim or any particular aspect of a claim.
5. Factors to be considered	We recommend that any judicial inquiry be entitled to consider any and all factors which may have given rise to the wrongful conviction, imprisonment or the continuation of that imprisonment.
6. Legal fees and disbursements	We recommend that appropriate legal fees and disbursements incurred by or on behalf of the wrongfully convicted person be paid as part of the inquiry's expenses.
7. Report to be public	We recommend that the inquiry report become a public document.

8.
Marshall compensation

We recommend that Government recanvass the adequacy of the compensation paid to Marshall in light of what we have found to be factors contributing to his wrongful conviction and continued incarceration.

Visible Minorities in the Criminal Justice System

9.
Policy on Race Relations

We recommend that the Departments of the Attorney General and Solicitor General adopt and publicize a Policy on Race Relations that has as its basis a commitment to employment equity and the elimination of inequalities, based on race, in these Departments and their agencies and the reduction of racial tensions between these Departments and the communities with which they interact.

10.
Cabinet Committee on Race Relations

We recommend that a Cabinet Committee on Race Relations be established which would include the Attorney General and Solicitor General. This Committee should meet regularly with representatives of visible minority groups in order to assure the input of these groups in matters of criminal justice.

11.
Dalhousie Law School's minority admissions program

We recommend that the Dalhousie Law School's minority admissions program for Micmacs and indigenous Blacks receive the financial support of the Governments of Canada and Nova Scotia, and the Nova Scotia Bar.

12.
Appointment of judges and board members

We recommend that Governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members whenever possible.

13.
Programs for law students, lawyers, judges

We recommend that the Dalhousie Law School, the Nova Scotia Barristers Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.

14.
Programs for Crown prosecutors

We recommend that the Attorney General establish continuing professional education programs for Crown prosecutors, which would include:
(a) an exposure to materials explaining the nature of systemic discrimination toward Black and Native peoples in Nova Scotia in the criminal justice system; and
(b) an exploration of means by which Crown prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotia criminal justice system.

15.
Police training

We recommend that training for all police officers, both at the intake level and as continuing education, include content on police/minority concerns and sensitivity to visible minority issues.

16.
Public Legal Education programs and funding

We recommend that the Public Legal Education Society consult and work with Native and Black groups to develop and provide legal materials and services for minority users. These initiatives cannot be undertaken without specific funding. This should be provided where necessary by Government.

17.
Alternative Penalty Act

We recommend that the Government immediately proclaim the *Alternative Penalty Act*, S.N.S. 1989, c.2, and that regulations which address the particular needs of Native and Black offenders be enacted.

18.
Diversion programs

We recommend that the Province, in close cooperation with the Native and Black communities, formulate proposals for the establishment of appropriate diversion programs for Natives and Blacks, and that the Province actively recommend such programs to the Federal Government with proposals for any necessary amendments to the *Criminal Code*.

19.
Correctional programs

We recommend that the Department of the Solicitor General of Nova Scotia take steps to, and urge the federal correctional authorities to take steps to:
(a) immediately implement programs to recruit and hire more Natives and Blacks in professional and non-professional positions in the correctional service;
(b) implement ongoing education and training programs designed to sensitize correctional workers at all levels to the particular needs of Native and Black offenders based on their racial and cultural background;
(c) indicate to all correctional workers that discriminatory conduct (including racial slurs) against Natives and Blacks will not be tolerated and may result in adverse employment consequences;
(d) offer institutional programs emphasizing the educational, cultural and religious needs of Native and Black offenders in institutions where a significant number of Natives and Blacks are incarcerated; and
(e) support rehabilitation programs for Native and Black inmates and former inmates which take into account their background and needs.

Nova Scotia Micmac and the Criminal Justice System

20.
Native Criminal Court

We recommend that a community-controlled Native Criminal Court be established in Nova Scotia, initially as a five-year pilot project, incorporating the following elements:

(a) a Native Justice of the Peace appointed under Section 107 of the *Indian Act* with jurisdiction to hear cases involving summary conviction offences committed on a reserve;
(b) diversion and mediation services to encourage resolution of disputes without resort to the criminal courts;
(c) community work projects on the reserve to provide alternatives to fines and imprisonment;
(d) aftercare services on the reserve;
(e) community input in sentencing, where appropriate; and
(f) court worker services.

21.
Native Justice Institute

We recommend that a Native Justice Institute be established with Provincial and Federal Government funding to do, among other things, the following:

(a) channel and coordinate community needs and concerns into the Native Criminal Court;
(b) undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people;
(c) train court workers and other personnel employed by the Native Criminal Court and the regular courts;
(d) consult with Government on Native justice issues;
(e) work with the Nova Scotia Barristers Society, the Public Legal Education Society and other groups concerned with the legal information needs of Native people; and
(f) monitor the existence of discriminatory treatment against Native people in the criminal justice system.

22.
Tripartite forum on Native issues

We recommend that a tripartite forum (Micmac/ Provincial/Federal Government) similar to the Ontario Indian Commission be established to mediate and resolve outstanding issues between the Micmac and Government, including Native justice issues.

23.
Micmac interpreters

We recommend that all courts in Nova Scotia have the services of an on-call Micmac interpreter for use at the request of Micmac witnesses or accused.

24. Native court workers	We recommend that the Provincial and Federal Governments, in consultation with Native communities, work together to establish a Native court worker program, as an immediate first step in making the criminal justice system more accessible to Native people.
25. Sittings of Provincial Courts on reserves	We recommend that the Chief Judge of the Provincial Court take steps to establish regular sittings of the Provincial Courts on Nova Scotia reserves.
26. Legal Aid funding	We recommend that Nova Scotia Legal Aid be funded to permit them to: **(a)** specifically assign lawyers to work with Native clients to develop a specialization with respect to the concerns of Native people; and **(b)** hire a Native social worker/counsellor to, among other things, act as a liaison between Native people and the Legal Aid service.
27. Liaison with bar	We recommend that a program of ongoing liaison between the bar - prosecutors, private defence and legal aid - and Native people, both on and off reserve, be established through the Nova Scotia Barristers Society. The Society must also educate its members concerning the special needs of Native clients.
28. Native constables	We recommend that the RCMP and municipal police forces, where applicable, take immediate steps to recruit and hire Native constables.
29. Native Justice Committee	We recommend that the advice of leaders chosen by the Native community and sitting as a Native Justice Committee be sought by judges in sentencing Natives, where possible.
30. Probation and aftercare	We recommend that the Provincial and Federal Governments facilitate and finance mechanisms by which Native people can have more control over the treatment of Natives convicted of an offence, such as establishing a probation officer capability and community-based aftercare services on-reserve.

Blacks in the Criminal Justice System

31.
Amendments to *Human Rights Act*

We recommend that the Nova Scotia *Human Rights Act* be amended:
(a) to require that an annual report of the Commission's activities be submitted to the Minister who shall place the report before the Legislative Assembly;
(b) to specifically state that those parts of the justice system under provincial jurisdiction are included in the Act's coverage;
(c) to provide that where the Commission is unable to settle a complaint, and where the Commission recommends the appointment of a Board, it shall report to the Minister who shall appoint a Board of Inquiry (Section 25 now gives the Minister a discretion as to whether a Board should be appointed); and
(d) to establish within the Commission a Race Relations Division reporting to the Commission through one or more members, at least one of whom shall be full time and designated as Race Relations Commissioner.

32.
Funding for Human Rights Commission

We recommend that the Human Rights Commission be provided with sufficient resources to enable it to effectively carry out its present mandate and further responsibilities added by our recommendations, and in particular to enable it:
(a) to retain independent legal counsel; and
(b) to engage in an active public awareness program, particularly in the area of Native and Black concerns.

33.
Responsibility of Chief Judges

We recommend that the Chief Justices and the Chief Judges of each court in Nova Scotia exercise leadership within his or her area of responsibility to ensure fair treatment of visible minorities in the criminal justice system.

34.
Legal Aid funding for Black clients

We recommend that, because of the dependence of Black clients on legal aid services, the funding of legal aid in Nova Scotia be re-examined to ensure that there are sufficient counsel to properly serve minority clients and to engage in proactive programs in minority communities.

Administration of Criminal Justice

35.
Director of Public Prosecutions

We recommend that:
(a) there be created by statute the office of Director of Public Prosecutions, and that the holder of this office:
  (i) be a member of the bar of Nova Scotia (or equivalent) for a minimum of ten years;

(ii) be appointed by the Governor in Council after consultation with the officers of the Nova Scotia Barristers Society and with the two Chief Justices of the Superior Courts in Nova Scotia, for a term of ten years, with eligibility for re-appointment;

(iii) be removable for cause by the Governor in Council only after a resolution from the provincial legislature approving such action;

(iv) be paid and given employment benefits not less than those of a judge of the County Court of Nova Scotia, and have the status of a departmental "deputy head";

(b) the duties and responsibilities of the Director of Public Prosecutions include:

(i) the exercise of all of the functions of the Attorney General as agent and deputy of the Attorney General in relation to the administration of criminal justice in the province, subject to paragraph (c) below; and in particular;

(ii) regular consultation with the Attorney General concerning all aspects of public prosecution and the administration of the prosecution service;

(iii) the direction of the prosecution service of the province, including supervision of those functions presently exercised by the Director (Prosecutions) and the Director (Criminal);

(iv) the presentation of an annual report to the Attorney General on the conduct of public prosecutions in the province, which shall describe, among other matters, any personal interventions by the Attorney General pursuant to paragraph (c)(i);

(c) the Attorney General continue to exercise the duties and responsibilities traditionally accorded to that office in relation to the administration of criminal justice, subject only to the limitations which follow:

(i) where he or she deems it necessary, the Attorney General may intervene in a prosecution contrary to the advice of the Director of Public Prosecutions but only through the use of written instructions which shall be published within 30 days of their issuance in the *Royal Gazette*, or following expiry of the appeal period, whichever is later;

(ii) the Attorney General shall, after consultation with the Director of Public Prosecutions, issue guidelines for the exercise of prosecutorial discretion which shall be tabled in the provincial legislature as soon as is practicable after their issuance; and

(iii) the Attorney General shall table in the provincial legislature as soon as is practicable the annual report received from the Director of Public Prosecutions pursuant to paragraph (b)(iv).

36.
Policy statement on the role of police

We recommend that the following policy statement be included in the Crown Prosecutors' Manual:

(a) in the investigation of offences prior to the laying of charges, it is understood that the police officers are to carry out their duties in accordance with the law and general standards, practices and policies established by the Solicitor General, but in consultation with the appropriate Crown prosecutor where necessary; and

(b) after the laying of charges, police shall carry out any investigations in accordance with the instructions of the Attorney General or appropriate prosecutor with a view to preparation of the case for presentation in court.

37.
Laying of charges

We recommend that:

(a) police officers be informed in general instructions from the Solicitor General that they have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(b) within each police force there be a clear written policy on resolving disagreements between police and Crown over the laying of charges, and that such policy provides that no charge shall be laid contrary to the advice of the Crown unless and until discussions have been held between the highest levels of police and Crown;

(c) within each police force and within the Department of Attorney General there be a clear written directive requiring absolute confidentiality and secrecy of the identity of persons being investigated other than on a need to know basis within the police force and the Department;

(d) prosecutors be informed in general instructions from the Attorney General that police officers have the right and the duty to determine the form and content of charges to be laid in any particular case, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(e) police officers and Crown prosecutors be informed by their respective departmental superiors that police are encouraged to consult with the appropriate prosecutor concerning the drafting of informations, where such consultation might be thought useful; and

(f) the Attorney General institute a system of post-charge screening in appropriate locations in the province (initially as a pilot project) to ensure that no charges which are not strictly necessary in accordance with the evidence and the public interest shall go forward.

38.
Factors to be considered when stopping prosecutions

We recommend that:

(a) the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;

(b) the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:

(i) the triviality of the alleged offence or that it is of a "technical" nature only;

(ii) the age, physical health, mental health or special infirmity of an alleged offender or witness;

(iii) the staleness of the alleged offence;

(iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);

(v) the likely effect of a prosecution on public order and morale;

(vi) the obsolescence or obscurity of the law;

(vii) whether the prosecution would be perceived as counter-productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);

(viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;

(ix) the prevalence of the alleged offence and any related need for deterrence;

(x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;

(xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;

(xii) the attitude of the victim of the alleged offence to a prosecution;

(xiii) the likely length and expense of a trial;

(xiv) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;

(xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

(xvi) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice;

(c) the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:

(i) the alleged offender's race, religion, sex, national origin, political associations, or beliefs;

(ii) the prosecutor's personal feelings concerning the victim or the alleged offender;

(iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or

(iv) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision;

(d) where the prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question;

(e) the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.

39.
Disclosure by Crown

We recommend that the Department of Attorney General of Nova Scotia urge the Federal Government to implement amendments to the *Criminal Code* of Canada as follows:

1. A justice shall not proceed with a criminal prosecution unless he is satisfied:
(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution; and
(b) that the accused has been advised of his right to disclosure.

2(1) Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:
(a) to receive a copy of his criminal record;
(b) to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;
(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;
(d) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;
(e) to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;
(f) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;
(g) to receive a copy of the criminal record of any proposed witness; and
(h) to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.

2(2) The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the Crown and may be limited only where, upon an *inter partes* application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.

2(3) Subsection (1) imposes a continuing obligation on the prosecutor to disclose the items as above provided.

2(4) A statement referred to in sub-paragraph (b), (d) or (f) of subsection (1) does not include a communication that is governed by the "Invasion of Privacy" provisions of the *Criminal Code*.

3. Where a justice having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of subsections 2(1) and 2(2) above, he shall, at the accused's request, adjourn the proceedings until, in his opinion, there has been compliance, and he may make such other order as he considers appropriate in the circumstances.

40.
Application to limit disclosure

We recommend that no application to limit disclosure be made without the prior written approval of the Director of Public Prosecutions or a Deputy Attorney General.

41.
Interim policy on disclosure

We recommend that until the proposed statutory amendments to the *Criminal Code* are effected, the Attorney General adopt and implement as a matter of policy the duties of disclosure reflected in the preceding recommendation.

42.
Police duty to disclose

We recommend that:
(a) the Solicitor General inform police forces operating within the province of the Attorney General's directive on disclosure and require compliance with its principles in relations between police and prosecutors;
(b) the Solicitor General ensure that continuing police training includes information on the necessity of compliance with disclosure policy.

43.
Plea discussions and agreements

We recommend that the existing policy directive on plea discussions and plea agreements be revised to clearly set out the basis for the exercise of discretion by Crown prosecutors in this area, and that such directive in particular set out the governing principles of openness, voluntariness, accuracy, appropriateness and equality.

44.
Summaries to trial judges

We recommend the abolition of summaries to trial judges and the abolition of the practice of providing trial judges with copies of preliminary inquiry transcripts.

45.
Regional prosecuting officers

We recommend that a system of chief prosecuting officers for each region be adopted in order to create an effective middle level of management in Nova Scotia's prosecution service.

Police and Policing

46.
Police Commission resources and staffing

We recommend that the Police Commission be provided with sufficient resources to enable it to fulfill properly the leadership, training, information and assessment roles that constitute its mandate. Such resources should include funding for:
(a) restoring the position of Chairman of the Police Commission to a full time position;
(b) the appointment of four part time Commissioners who are broadly representative of community and public interest in policing;
(c) the appointment of an experienced Executive Director whose responsibilities will include Research, Information and Statistics; Training and Personnel Development; Advisory Services; and Security.

47.
Assessment of municipal police departments

We recommend that the Police Commission conduct regular assessments of the operations of each municipal police department in accordance with the provisions of the *Police Act.*

48.
RCMP input to Police Commission

We recommend that the Solicitor General require the RCMP to provide information concerning RCMP operations in the province to the Police Commission on an ongoing basis so the Commission can develop and plan rational policing policy and an adequate police information system in the province.

49.
Funding for policing

We recommend that the Police Commission develop and maintain close liaison with officials in the Department of Municipal Affairs and the Executive of the Union of Nova Scotia Municipalities with a view to developing a more rational basis for provincial financial assistance for municipal policing services.

50.
Independence of Police Commission

We recommend that the Police Commission not be absorbed into the mainline structure of the Solicitor General's Department to keep it relatively independent of political considerations and to better reflect the municipal-provincial partnership that characterizes the Nova Scotia organization of policing services.

51.
Executive Director (Policing)

We recommend the establishment within the Solicitor General's Department of an Executive Director (Policing) to reflect its increasing role in policing in the province.

52.
Liaison with boards of police commissioners

We recommend that a regular annual meeting be held by the Police Commission with the chairs of all Nova Scotia boards of police commissioners. The purpose would be to provide a forum for information exchange, program development and possible collaboration among municipal police departments in various matters, from equipment to crime prevention.

53.
Independence of Police Review Board

We recommend that the Chairman of the Nova Scotia Police Commission not act as the Registrar of the Police Review Board, and that the Nova Scotia Police Commission not provide investigative services to the Police Review Board.

54.
Independence of police forces

We recommend that the *Police Act* be amended to make it clear that it is unlawful for anyone other than a police officer of the same force to issue any order, direction or instruction to any member of a police force relative to his/her duties as a member of the force, except when communicating a decision of the force's lawful governing authority, and that a governing authority shall only issue such order, direction or instruction to the Chief or someone who is acting in his or her stead.

55.
Minority recruitment

We recommend that the recruitment of visible minority group members be actively encouraged by both police and governing authorities. Both the RCMP and municipal police departments in the province should establish specific recruitment targets which reflect the distribution of the visible minority groups in the population.

56.
Outreach recruitment

We recommend that particular attention be given to using outreach recruitment methods (for example, having visible minority officers involved in recruitment; building up contact with minority communities to facilitate recruitment). The guidelines prepared by the Greater Toronto Region Working Group on Policing in Multicultural, Multiracial Urban Groups on the recruitment and selection of visible minority police officers should be circulated to all relevant police organizations in the province.

57.
Minorities in management positions

We recommend that action be taken to get members of visible minorities into police management positions.

58.
Minority/police relations

We recommend that the Nova Scotia Police Commission take a strong leadership role in police/visible minority relations by providing useful materials to departments (comparable in quality to those now made available to its officers by the RCMP), arranging imaginative in-service training in conjunction with the Atlantic Police Academy or similar bodies, and assisting departments in the setting up of race relations liaison officers or committees.

59.
Access of minorities to police

We recommend that, together with the Nova Scotia Police Commission, municipal police departments and local boards of police commissioners develop imaginative outreach programs and liaison roles in order to provide visible minorities with greater access to and more positive interaction with the police.

60.
Discrimination in police departments

We recommend that municipal police departments adopt as an objective the eradication in police departments of racial slurs and stereotyping, and in pursuit of this objective promulgate official policies and guidelines on stereotyping similar to those currently employed by the RCMP (RCMP Administration Manual 111.9) or the Metropolitan Toronto Police Force (standing order number 24).

61.
Training

We recommend that special attention be given to more intensive training for cadets whose first assignment will be in areas of high visible minority concentration. In addition, detachments and municipal police departments located in areas of high visible minority concentration should allocate proportionally more of their resources to multicultural and race relations training. The Police Commission should monitor detachment and municipal police department performance in this area.

62.
Sensitivity to minority concerns

We recommend that education and sensitivity training with respect to visible minorities be more pronounced in the cadet training curriculum and should be a component of regular in-service training.

63.
Atlantic Police Academy programs

We recommend that the Atlantic Police Academy be encouraged to continue to develop in-service programs and imaginative experimental initiatives for police/visible minority interaction.

64.
Guidelines on other than full time personnel

We recommend that guidelines be developed by the Police Commission with respect to the use by municipal police departments of part time, volunteer and auxiliary personnel.

65.
Promotion guidelines

We recommend that routine promotion guidelines be established in all municipal police departments. In all but the largest municipal police departments the involvement of the Police Commission and/or outside consultants should be required.

66.
Selection of chief of police

We recommend that in all but the largest municipal police departments the involvement of the Police Commission and/or outside consultants be required in the selection of the chief of police.

67.
Supervisory and management training

We recommend that more training be provided for those promoted to supervisory and management positions in the municipal police departments. Training in courses on supervision and executive development should accompany such promotion.

68.
Monitoring of training

We recommend that the Solicitor General's Task Force on Municipal Police Training, as well as the data collected as part of the Police Study for this Report, be used to establish an ongoing system for monitoring levels of training in the province. The system should be maintained by the Police Commission or equivalent body and should incorporate clear definitions of the types of training appropriate for the needs of particular members, departments and detachments.

69.
Assessment of police officers

We recommend that periodic assessment of municipal police department officers be carried out as in Nova Scotia's recently announced "force continuum program" which deals with the use of firearms and mace. Common standards should be developed for certification in these areas and consideration should be given to the inclusion of physical fitness and basic response/preliminary investigation imperatives.

70.
Investigative skills

We recommend that all constables be required to have basic investigative skills such as would be required to secure the crime scene and carry out proper preliminary recording and investigation.

71.
Guidelines for investigations

We recommend that municipal police departments cooperate with the Police Commission to produce a uniform set of guidelines for investigative work.

72.
Evaluation of investigative capabilities in police departments

We recommend that the Police Commission undertake a systematic evaluation of the investigative capacities available in all municipal police departments in the province. This evaluation should be coordinated with periodic reviews of the municipal police departments.

73.
Directive on investigation of murder/attempted murder

We recommend that the current standing directive on municipal police department responsibilities for the investigation of murder and attempted murder be regarded as a flexible directive which may change to reflect alterations in municipal police department investigative capacities. This may involve broadening the scope of exemptions, or it may lead to the inclusion of other serious crimes in the list of offences which some municipal police departments may not be able to handle.

74.
Interviewing juveniles and the mentally unstable

We recommend that in cases where suspects and/or witnesses are juveniles or mentally unstable, investigating officers make special efforts to ensure they are treated fairly. Supportive persons from the witness/suspect viewpoint should be present during interviews.

75.
Recording police interviews

We recommend that audio-visual recording of police interviews of chief suspects and witnesses in serious crimes such as murder, and of juveniles and other interviewees who may be easily influenced, be encouraged.

76.
Internal review of investigations

We recommend that it be standard practice in all police departments for superiors to review, with investigators, the progress of investigations of all serious offenses.

77.
Delivery of policing services

We recommend that a joint task force be established by the Solicitor General and the Minister of Municipal Affairs, with representation from the other relevant bodies, to examine the organization and delivery of policing services within the province, and in particular, to consider and review the desirability and feasibility of some regionalization of existing municipal policing services in the province, and to make recommendations to the Government on these matters. Such a review should also examine other less comprehensive collaborative arrangements which might beneficially be established or further developed between existing municipal police forces and the RCMP to improve the quality and efficacy of the delivery of policing services in the province.

78.
Minimum standards for policing

We recommend that all municipal police departments be able to deliver police services according to a set of minimum standards for policing in Nova Scotia. This set of standards should be developed by the Police Commission with appropriate input from both provincial (Solicitor General) and municipal (local police commissions) governing authorities. Recognizing that the primary responsibility for delivery of police services is with the municipalities and that it may be beyond the financial capability of some to upgrade their municipal police department according to these minimum standards, the Province must ensure that the municipal police departments have the resources to meet the prescribed standards.

79.
Departmental plans

We recommend that municipal police departments establish departmental plans which include a clear definition of departmental goals and priorities, and appraisal systems for evaluating job performances.

80.
Management systems

We recommend that priority be given to improving police management systems among the municipal police departments, focussing on greater communication, feedback and accountability among departmental members.

81.
Code of ethics

We recommend that municipal police departments be encouraged to develop a code of ethics as positive guidelines for behavior. For purposes of continuity and consistency and for minimum standardization, such codes should be developed in consultation with the Atlantic Police Academy and the Police Commission.

82.
Reinvestigations

We recommend that guidelines be developed by the Solicitor General and Attorney General Departments detailing procedures to be followed where it is necessary for there to be a reinvestigation of the work of a police force. Any such reinvestigation of the work of a municipal police department should be conducted by the RCMP, with out-of-province assistance if required. All reinvestigations should be thoroughly reviewed by the Department of Attorney General.

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1
Order in Council

By His Honour
The Honourable Alan R. Abraham, C.D.
Lieutenant Governor of Nova Scotia

To: The Honourable Mr. Justice T. Alexander Hickman
The Honourable Mr. Justice Lawrence A. Poitras
The Honourable Mr. Justice Gregory Thomas Evans

Greetings:

Whereas it is deemed expedient to cause inquiry to be made into and concerning the public matters hereinafter mentioned in relation to which the Legislature of Nova Scotia may make laws;

Now know ye that I have thought fit, by and with the advice of the Executive Council of Nova Scotia, to appoint, and do hereby appoint you:

The Honourable Mr. Justice T. Alexander Hickman
The Honourable Mr. Justice Lawrence A. Poitras
The Honourable Mr. Justice Gregory Thomas Evans

to be, during pleasure, Our Commissioners under the *Public Inquiries Act* to constitute a Commission under the Chairmanship of the Honourable Mr. Justice T. Alexander Hickman with power to inquire into, report your findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sandford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr. with that death; the subsequent conviction and sentencing of Donald Marshall, Jr. for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry;

The Governor in Council is further pleased to:

(1) **Authorize** the payment to the Commissioners for expenses for travel, reasonable living expenses and other disbursements necessarily incurred in the Inquiry, in accordance with the provisions of the *Judges Act*, R.S.C. 1970, as amended;

(2) **Direct** the Commissioners to retain the services of legal counsel and such other technical, secretarial and clerical personnel who, in the opinion of the Commissioners are required for the purposes of the Inquiry, at remunerations as shall be approved by Management Board and authorize the Commissioners to approve for payment reasonable expenses for travel, accommodation, meals and other disbursements necessarily incurred by such personnel for the purposes of the Inquiry;

(3) **Direct** the Commissioners to arrange for suitable facilities, recording and transcribing equipment and such other administrative matters which, in their opinion, are necessary for the purpose of the Inquiry and authorize the Commissioners to approve for payment any costs incurred in respect to the foregoing matters;

(4) **Order** that remuneration, costs and expenses payable in respect to the Inquiry shall be paid out of the Consolidated Fund of the Province;

(5) **Order** that the Commissioners may adopt such rules, practices and procedures for the purposes of the Inquiry as they, from time to time, may consider necessary for the proper conduct of the Inquiry, and may vary such rules, practices and procedures from time to time as they consider necessary and appropriate for the purposes of the Inquiry;

(6) **Direct** the Commissioners to report their findings and recommendations in the matter of their Inquiry to the Governor in Council.

***Given** under my hand and Seal at Arms at the City of Halifax this 28th day of October in the year of Our Lord one thousand nine hundred and eighty-six and in the thirty-fifth year of Her Majesty's reign.*

Provincial Secretary

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Royal Commission staff

Commissioners:

Chief Justice T. Alexander Hickman, Chairman
Associate Chief Justice Lawrence A. Poitras
The Honourable Gregory T. Evans, Q.C.

Counsel:

George W. MacDonald, Q.C.
David B. Orsborn
W. Wylie Spicer

Commission Executive Secretary:

M. Lois Dyer (January 1, 1987 - August 24, 1987)
Susan M. Ashley (August 25, 1987 - December 1989)

Support Staff:

Administrative Assistant:
Jean Miller (January 28, 1987 - July 15, 1988)
Laurie Burnett (July 18, 1988 - December 1989)

Word Processor:
Laurie Burnett (February 9, 1987 - July 15, 1988)
Barbara Shanks (July 18, 1988 - December 1989)

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Janice Cook

Librarian:
Brenda McGilvray

Director of Research:
John E. S. Briggs

Investigators:
Fred Horne
Jim Maloney

Editor:
Stephen Kimber

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Wilfred Smith (Sydney)
Peter MacDonald (Halifax)

Court Reporters:
Sydney Discovery Services (Sydney)
Margaret Graham Discovery Services (Halifax)

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Parties granted standing

Parties with Standing	Counsel
Donald Marshall, Jr.	Clayton Ruby Marlys Edwardh Anne Derrick
John F. MacIntyre	Ronald N. Pugsley, Q.C.
Royal Canadian Mounted Police	James D. Bissell, Q.C.
Correctional Services Canada National Parole Board Department of Justice Canada Department of Solicitor General of Canada	Al Pringle
City of Sydney Police Commission	M. G. Whalley, Q.C.
William Urquhart	Donald C. Murray
Oscar Nathaniel Seale Black United Front	E. Anthony Ross
Attorney General of Nova Scotia Department of Attorney General	Jamie W. Saunders Darrel I. Pink
Union of Nova Scotia Indians	Bruce H. Wildsmith Graydon Nicholas
Estate of Donald C. MacNeil, Q.C.	Frank L. Elman, Q.C. David G. Barrett
Aldophus Evers Richard McAlpine Gary Green	William L. Ryan
Sergeant James Carroll	Charles Broderick
Staff Sergeant. H. F. Wheaton Inspector D. B. Scott	S. Bruce Outhouse, Q.C.
Sergeant Herb Davies	Guy LaFosse
Roland J. Thornhill	John Merrick, Q.C.

Observer Status	
Police Association of Nova Scotia	David W. Fisher
Nova Scotia Branch Canadian Bar Association	Gordon F. Proudfoot

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Notice of Inquiry

The Royal Commission on the Donald Marshall, Jr., Prosecution will commence Public Hearings at 10:00 a.m. on Wednesday, September 9th, 1987 in the Lower Hall, St. Andrew's United Church Hall, on Bentinck Street in the City of Sydney in the Province of Nova Scotia.

Copies of the Terms of Reference may be obtained by writing to the Secretary:

Susan M. Ashley
Commission Executive Secretary
Royal Commission on the Donald Marshall, Jr., Prosecution
Suite 1026 - Maritime Centre
1505 Barrington Street
Halifax, N.S. B3J 3K5

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Dates and locations of Public Hearings

Date	Location
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October 6-9, 1987	
October 26-29, 1987	
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January 11-14, 1988	Lord Nelson Hotel
January 18-20, 1988	Halifax, Nova Scotia
January 25-28, 1988	
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May 16-19, 1988	World Trade and Convention Centre
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June 27-28, 1988	
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September 19-21, 1988	Halifax, Nova Scotia
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November 1-3, 1988	Sydney, Nova Scotia

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Sandra Cotie	Vol. 18	Oct. 26, 1987
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Herb Davies	Vol. 47	Jan. 28, 1988
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Richard Walsh
John Mullowney
Howard Dean
Michael Bernard MacDonald
John Pratico
Raymond Rudolph Poirier
Dr. Maqbul A. Main

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Dr. Mahmood A. Naqvi
Terrance Gushue
Patricia Harriss
Mary Patricia Csernyik (O'Reilley)
Catherine A. Soltesz (O'Reilley)
Barbara Floyd
Sandra Cotie
Wayne Magee
Lawrence Burke

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8A.
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Richard Apostle
Department of Sociology and Social Anthropology
Dalhousie University
Halifax, Nova Scotia
May 11, 1988

Russell Lawrence Barsh
Lawyer
Seattle, Washington
November 28, 1988

James Bissell, Q.C.
Justice Canada
Halifax, Nova Scotia
August 18, 1988

A. Alan Borovoy
General Counsel
Canadian Civil Liberties Association
Toronto, Ontario
January 13, 1989

C. L. Campbell
Director
Atlantic Police Academy
Charlottetown, P.E.I.
August 23, 1988

Ken Chasse
Director of Research
Ontario Legal Aid Plan
Toronto, Ontario
July 22, 1988

Stanley A. Cohen
Coordinator, Criminal Procedure Project
Law Reform Commission of Canada
Ottawa, Ontario
June 4, 1988

Nadine Cooper-Mont
Deputy Solicitor General
Province of Nova Scotia
Halifax, Nova Scotia
October 5, 1988

W. Brent Cotter
Professor, Faculty of Law
Dalhousie University
Halifax, Nova Scotia
November 26, 1988

Ian B. Cowie
Consultant
Ottawa, Ontario
July 30, 1988

Ronald Delisle
Professor, Faculty of Law
Queen's University
Kingston, Ontario
October 13, 1987

Alexander Denny
Grand Captain
Eskasoni, Nova Scotia
June 29, 1988

Richard Gosse
Chairman
RCMP Public Complaints Commission
Ottawa, Ontario
January 19, 1989

Gordon Gregory, Q.C.
Barrister and Solicitor
Fredericton, New Brunswick
July 22, 1988
October 6, 1988

H. Archibald Kaiser
Professor, Dalhousie Law School
Halifax, Nova Scotia
October 19, 1987
June 28, 1988

Carol LaPrairie
Justice Canada
Ottawa, Ontario
June 10, 1988

Dan MacIntyre
Executive Coordinator
Race Relations Directorate of Ontario
Toronto, Ontario
November 16, 1988

Rod McLeod
Barrister and Solicitor
Winnipeg, Manitoba
September 22, 1988

Chris Murphy
Department of Sociology and Social Anthropology
Dalhousie University
Halifax, Nova Scotia
August 25, 1988

Daniel N. Paul
Executive Director
The Confederacy of Mainland Micmacs
Truro, Nova Scotia
June 23, 1988

Roland Penner
Dean, Faculty of Law
University of Manitoba
Winnipeg, Manitoba
October 10, 1988

Roland Perry, M.D.
Chief Medical Examiner of Nova Scotia
Halifax, Nova Scotia
September 6, 1988

Donald J. Purich
Director, Native Law Centre
University of Saskatchewan
Saskatoon, Saskatchewan
December 14, 1988

Viola M. Robinson
President
Native Council of Nova Scotia
Truro, Nova Scotia
June 22, 1988

Marc Rosenberg
Barrister and Solicitor
Toronto, Ontario
June 20, 1988
September 26, 1988

George A. Smith
A/Executive Director
Nova Scotia Police Commission
Halifax, Nova Scotia
May 9, 1988

8B.

List of Public Submission to the Commission

The following members of the public made written submissions to the Royal Commission:

Charles Balcom
Middleton, Nova Scotia

Frank Belliveau
Hamilton, Ontario

Lawrence Burton
Sydney, Nova Scotia

Gordon R. Carter
Berwick, Nova Scotia

James Chown
Bible Hill, Nova Scotia

Philip Cohen
Glace Bay, Nova Scotia

Joseph S. Conforti
Weston, Ontario

James William Cruickshanks
Dartmouth, Nova Scotia

D. Porter and Son Limited
New Glasgow, Nova Scotia

Judy Davis
Tatamagouche, Nova Scotia

Vern Dillabaugh
Ottawa, Ontario

Dr. Peter Dockwrey
Halifax, Nova Scotia

Keith M. Dorey
Dartmouth, Nova Scotia

Carol Farmer
Sydney, Nova Scotia

John Lloyd Feener
Bridgewater, Nova Scotia

Don Fraser
Victoria, British Columbia

Edwin Freisting
Prince Albert, Saskatchewan

Cletus D. Hallihan and Mrs. White
Sydney, Nova Scotia

Barbara Johnson
Newport, Nova Scotia

Jean C. MacDonald
Reserve Mines, Nova Scotia

Hugh MacKay
Middle Musquodoboit, Nova Scotia

Hugh MacKinlay
Bedford, Nova Scotia

Mrs. Carson J. McColl
Apsley, Ontario

Mrs. Patricia B. MacCulloch
Hubbards, Nova Scotia

Joseph C. Mullins
Sydney, Nova Scotia

John Newcomb
Lower Sackville, Nova Scotia

Clifford R. Olson
Kingston, Ontario

Keith H. Paris
Halifax, Nova Scotia

J. C. Phinney
Middleton, Nova Scotia

Alex J. Reddick
Dorchester, New Brunswick

Therese Robinson
Centre Burlington, Nova Scotia

Mike Rock
Bridgetown, Nova Scotia

Sharon Scanlan
Bridgetown, Nova Scotia

Allistair K. Scott
Sydney, Nova Scotia

Ron S. Seney
New Germany, Nova Scotia

Raymond Sheppard
Halifax, Nova Scotia

Chiyo Shimizu
Sydney, Nova Scotia

Leona Smith
Jordan Falls, Nova Scotia

St. James' Junior High School
Port aux Basques, Newfoundland

Tom Tasson
Edmonton, Alberta

Douglas W. Trider
Dartmouth, Nova Scotia

John Tucker
Sydney, Nova Scotia

Harry Wilson
Halifax, Nova Scotia

R. G. (Bob) Wilson
Winnipeg, Manitoba

9
Rules of Practice and Procedure

Short Title

1. These Rules may be cited as the Donald Marshall Inquiry Rules.

Application

2. These Rules apply to the Commission established under the *Public Inquiries Act*, R.S.N.S. 1967, c. 250 pursuant to Minute of Council dated the 28th day of October, 1986.

Interpretation

3. In these Rules:

"Act" means the *Public Inquiries Act*, R.S.N.S. 1967, c. 250.

"Chairman" means the person appointed by the Governor in Council to be chairman of the Commission.

"Commission Counsel" means counsel appointed by the Commissioners to assist them in their inquiry.

"Commissioner" means a person appointed by the Governor in Council to conduct the inquiry.

"Commission" means the Donald Marshall Inquiry established pursuant to Minute of Council and the Governor in Council's commission dated the 28th day of October, 1986.

"Governor in Council" means the Governor in Council of Nova Scotia.

Notice of Inquiry

4. (1) Notice of the Inquiry shall be served upon any person, Corporation, Minister of the Crown or Crown agency who, in the Commission's opinion, may have an interest in the Inquiry.

(2) In addition to, or in lieu of the Notice of Inquiry provided for in Subsection (1) of this Section 4, Notice of the Inquiry may be given by publication of the same in the Nova Scotia Gazette and in such Nova Scotia and other Canadian newspapers or other publications as in the opinion of the Commission would be appropriate.

(3) Notice of Inquiry shall set out the time and place appointed for the Inquiry.

Right to be Heard

5. (1) The following persons or their counsel shall have the right to be heard and to examine witnesses heard at public hearings of the Commission:

(a) Commission Counsel;

(b) Any person who in the Commission's opinion ought to be given such right and then upon such terms as the Chairman may direct.

(2) Any person wishing to be heard shall apply in writing to the Commission, within any time limits established by the Commission, for the right to be heard and to examine witnesses heard at public hearings of the Commission, and shall state specifically his interest and the extent of standing desired. Provided that the Commission is satisfied that standing is necessary for the protection of such interest, the Chairman may grant standing upon such terms as the Chairman may direct.

(3) At the conclusion of the public hearings of the Commission any person, group or association who has been granted standing in any capacity will have the right at that time to make submissions to the Commission in writing, and, if the Chairman deems it necessary or expedient so to do, to make oral submissions following the filing of such written submission. Any other person, group or association may, upon written application giving reasons for the request, be permitted to make a submission in writing to the Commission at the conclusion of the public hearings.

(4) The Commission may in its discretion hold hearings *in camera* and the Chairman shall decide in the circumstances of that particular case who shall be permitted to attend, which counsel shall be permitted to attend and what conditions may be imposed upon any persons or counsel permitted to attend.

(5) Persons having been granted standing may apply to Commission Counsel to call any witness or witnesses and such witness may be called by Commission Counsel. Any witness so called may in the discretion of Commission Counsel be examined first by Commission Counsel and then, subject to the provisions of Subsection (5) of Section 7 of these Rules, by other persons having the right to be heard and to examine witnesses at public hearings of the Commission in the order designated by the Chairman.

Commission Counsel

6. (1) Commission Counsel shall assist the Commission in the orderly conduct of the Inquiry and ensure that all relevant evidence is submitted to the Commission.

(2) At any public hearing any member of the public may request Commission Counsel, in writing, to ask a particular question of a witness and Commission Counsel may, in his discretion, ask such question.

Inquiry Procedure

7. (1) Prior to the commencement of public hearings for the purpose of hearing witnesses, the Commission may hold procedural hearings for the purpose of determining what persons shall have the right to be heard and for the purpose of having Commission Counsel tender documentary or other evidence which Commission Counsel determines should be tendered in advance of the public hearings for the convenience of the Commission or persons entitled to be heard.

(2) The Notice of Inquiry shall be read at the first public hearing of the Inquiry.

(3) Commission Counsel shall proceed first with the examination of witnesses.

(4) Commission Counsel may examine, cross-examine or re-examine all witnesses.

(5) Other persons having been granted standing may, in such order as the Chairman directs and subject to such terms as may have been imposed upon such right by the Chairman under the provisions of Subsection (1)(b) or (2) of Section 5 of these Rules, cross-examine witnesses called by Commission Counsel.

Presence of Interested Persons

8. At the time and place appointed for holding the Inquiry the Commission may proceed with the Inquiry whether or not persons granted standing or their counsel are present.

Attendance of Witnesses

9. Where the Commission requires the attendance of any witness, either of its own motion or as a result of any application, the Notice to be served on the witness shall be in the form set out in Schedule 1.

Production of Documents

10.(1) Where the Commission requires the production of any document by any person either of its motion or as a result of an application, notice to be served on that person shall be in the form set out in Schedule 2.

(2) Other persons granted standing may apply to Commission Counsel to require the production of any document and Commission Counsel may in his discretion require the production of such document.

Service of Documents

11. Any notice, summons or other document issued under these Rules may be served personally at the address of the person to be served, by certified post, or by such other method of service as the Chairman may direct.

Evidence

12.(1) The Commission may admit as evidence Affidavits, Statutory Declarations, Rogatory Commissions and other evidence made or taken under the laws of Canada or any other country that may be applicable in any case in which the Commission considers it fit and proper to have such evidence presented, and whether such evidence is sworn or unsworn. The Commission may also in its discretion and as the Chairman may direct admit transcripts of related proceedings and statements of individuals whether or not such individuals are available for examination and cross-examination.

(2) Without restricting the generality of Subsection (1), the Commission may admit such written, oral or other evidence as the Commission may in its discretion deem relevant, whether or not the admission of such evidence is in accordance with the normal rules of evidence.

(3) Questions asked and documents and exhibits tendered as evidence in the course of the examination of witnesses called on behalf of the Commission shall not be open to objection merely on the ground that they do or may raise questions or issues that are not contained in or vary from the Terms of Reference contained in the Minute of Council.

(4) Where documentary evidence or a witness is outside the jurisdiction of Nova Scotia or is otherwise not available for Commission hearings, the Chairman or such person or persons as he may designate may be authorized to obtain such evidence in such manner as the Chairman may direct.

(5) Where possible the evidence of witnesses shall be taken under oath or solemn affirmation and witnesses shall be sworn or affirmed in the manner provided by the high courts having jurisdiction over the place where the evidence is taken.

(6) All evidence taken in any manner provided for by these Rules shall form a part of the record of the proceedings of the Commission.

Submissions by Counsel

13.(1) When all evidence has been adduced before the Inquiry, Commission Counsel and other persons granted standing shall have the right to address the Commission *viva voce* in such order as the Chairman directs and Commission Counsel shall have the right to address the Commission first and to make the final submission to the Commission.

(2) The Chairman may direct that written submissions be made by counsel and other persons entitled to be heard in lieu of or in addition to their oral submissions.

The Chairman

14.(1) The Chairman shall rule on any objections raised, determine all matters of procedure not provided for by these Rules and, when in his discretion it is necessary or desirable for the purpose of fully discharging the duties of the Commission, may allow departures from these Rules.

(2) The Chairman shall determine the admissibility of any evidence tendered at such time as he deems fit.

(3) The Chairman or any person designated by him may, in such a manner as the Chairman directs, take evidence *in camera* and in the absence of Commission Counsel or persons having the right to be heard and to examine witnesses at public hearings.

(4) The Chairman or any Commissioner or person designated by the Chairman to take evidence may take such evidence within or without Nova Scotia.

(5) Where by these Rules reference is made to a decision of the Commission, such decision of the Commission shall be enunciated by the Chairman.

Quorum

15. A quorum for public hearings of the Commission shall be not less than two Commissioners.

Adjournments

16. The Commission may adjourn its inquiry from time to time and from place to place.

Amendments

17. These Rules may be amended from time to time by the Commission as it sees fit.

Amendment to Rules of Practice and Procedure

1. Amend Rule 5 (5) to read as follows:

(5) Persons having been granted standing may apply to Commission Counsel to call any witness or witnesses and such witness may be called by Commission Counsel. Any witness so called may in the discretion of Commission Counsel be examined first by Commission Counsel and then, subject to the provisions of Subsection (5) of Section 7 of these Rules, by other persons having the right to be heard and to examine witnesses at public hearings of the Commission in the order designated by the Chairman. *In the event Commission Counsel elect not to call any such witness, the party requesting that such witness be called may apply to the Commission for directions.*

2. Delete Rule 12 (3).

10
Selected Rulings of the Commissioners

A. On the matter of applications for the provision of funding for legal counsel, May 14, 1987

Application has been made on behalf of various parties requesting the Commission to order the Province of Nova Scotia to pay for legal counsel to be retained by such parties or, in the alternative, requesting the Commission to recommend that the Province of Nova Scotia provide such payment. We do not consider it necessary, at this time, to determine whether the Commission has power to order the Province to provide payment for such legal counsel. However, we do believe that, absent any prohibition, it is implicit in the Terms of Reference of any Royal Commission that it has the capacity, and indeed the obligation, to respond to any party who has been granted standing and who raises an issue of participant funding. To refuse to respond to such a request would be inconsistent with a tradition of Royal Commissions, a tradition which encourages full participation in a public and independent forum. In recent times, similar requests have been responded to by then Mr. Justice Berger, Mr. Justice Grange, Mr. Justice Estey and Mr. Justice Parker.

The Commission, if its findings are to be considered credible, must be perceived to be conducting fair Hearings, and to be doing everything possible to ensure that proper representation is provided for all parties whose participation in all, or some particular part, of the Hearings is required. It would be extremely unfortunate, and inconsistent with the proper administration of justice, if a necessary party were prevented from presenting its full story to the Commission due to lack of financial resources. The public interest is unlikely to be served adequately if only some interested groups and parties are represented, since necessarily that would risk having our findings influenced in favour of those parties who are either better organized or better funded.

We consider funding should only be made available if the public interest demands that the cost of such parties should be paid from the public purse, and then only to the extent the parties cannot afford to provide their own counsel. Wherever funding is provided by the Provincial Government to any party, it is our recommendation that the amounts to be paid should be subject to taxation. In this way there should be prevention of costly duplication of work and resources, and adequate protection of public funds.

The Commission is of the opinion that, with the exception of the Attorney General for Nova Scotia, none of the parties granted standing can reasonably take the position that either the public interest or their own interest requires the presence of legal counsel on their behalf throughout the Hearings. The Province of Nova Scotia has retained outside counsel to represent the present and former Attorneys General and the employees of the Department.

Those parties who have been granted standing and who played an important role in the events leading to the arrest and conviction of Donald Marshall, Jr., and who could reasonably assume that their conduct may be attacked, would want their counsel to be present when they are giving evidence themselves and whenever evidence is being adduced which would tend to call their conduct into question. The public interest in having the Hearings conducted fairly demands that such parties not be denied the right to defend vigorously their conduct because of their inability to pay counsel.

In this case the perception of fairness is of particular importance because the Province of Nova Scotia has elected to provide funding for counsel for Donald Marshall, Jr., whose interest is adverse to other parties who have been granted standing. Fairness demands that these parties be given every opportunity to have their interest protected. John F. MacIntyre and the Estate of Donald C. MacNeil, Q.C. fall into this category and each has advised the Commission that they cannot afford to pay legal counsel. It is our recommendation that payment for such counsel be made by the Province of Nova Scotia.

Another group of parties who have been granted standing, all of whom are, or were, members of the RCMP, may want their counsel present while they are on the witness stand, but it is unlikely they could reasonably suggest that the protection of their individual interests require that independent counsel attend during the presentation of most other evidence. We understand the Federal Government provides funding for counsel for such persons while they are giving evidence, and when they are being interviewed by Commission counsel.

Standing has been granted to the RCMP and counsel has been appointed by that body to represent the interests of the Force, and presumably, all members of the Force to the extent that they were acting in the scope of their employment. It is our understanding that counsel for the RCMP intends to be present during most of the Hearings. The Federal Government recognizes that individual members of the RCMP require independent counsel on occasion. Counsel for the various members of the RCMP have indicated that circumstances could arise, other than when their clients are giving evidence where a conflict might exist between their interests and those of the RCMP. Given the intention of the Federal Government to provide funding to individual members of the Force in certain circumstances, we suggest it is that body to whom these Applicants should look for additional funding.

Those parties who represent the public interest, or groups thereof, fall into a different category. Standing has been granted to the Black United Front and the Union of Nova Scotia Indians. These groups requested standing because they hold the view that discrimination and racism influence the administration of justice in the Province of Nova Scotia, and may have contributed to Donald Marshall, Jr. being convicted and sent to prison. These serious allegations will be considered by the Commission. We believe that the public interest requires, in a proper case, that the point of view of organized and affected minority groups be appropriately represented and articulated. This is such a proper case. The extent of involvement required at the Hearings by counsel for these groups is difficult to predict at this time.

The Commission has also instructed its counsel to confer with both such groups prior to experts being retained by the Commission to carry out research concerning the matters of racism and discrimination.

Finally, we consider the Application of Oscar Nathaniel Seale, father of the late Sandford William Seale. Mr. Seale consistently has maintained the position that his son's reputation was being attacked and damaged without any opportunity having been afforded to the Seale family to respond. His position is comparable to that of the parents of children considered by the Grange Commission to have a sufficient interest in the outcome of that Inquiry to warrant public funding for their counsel. In the submission made on behalf of Mr. Seale it was indicated he cannot afford counsel. It is clear his interest relates only to the events which occurred on the night when this tragedy took place, and we consider he should be provided funding to enable counsel to be present to represent the interest of the family when those events are being considered at the Hearings. During the submission made yesterday, counsel for Mr. Seale indicated he would also be representing the Black United Front, and thereby the costs to be incurred for the representation of Mr. Seale would be less than normally might have been the case.

The Commission accordingly makes the following recommendation to the Governor in Council:

1. That, consistent with the foregoing principles, public funding for legal counsel be provided John F. MacIntyre, the Union of Nova Scotia Indians, the Black United Front, the Estate of Donald C. MacNeil, Q.C., and Oscar Nathaniel Seale;

2. That no funding be provided by the Province of Nova Scotia for Adolphus James Evers, Gary Green, R. A. McAlpine, Herb Davies, H. Wheaton and D. Scott;

3. That any accounts rendered for participant funding be reviewed (taxed). Counsel for all Applicants impressed the Commission with their assurances of a responsible approach to the expenditure of public funds, and we believe that taxation of accounts rendered will provide public assurance of such responsibility.

We recognize that the Governor in Council is not required to accept our recommendations. However, we have unique knowledge concerning the scope of this Inquiry and are in the best position to make recommendations. We expect, therefore, our recommendations will be given serious consideration.

DATED this 14th day of May, 1987 at Halifax, Nova Scotia.

Chief Justice T. Alexander Hickman,
Chairman

Associate Chief Justice Lawrence A. Poitras,
Commissioner

The Honourable Gregory T. Evans,
Commissioner

B. On the matter of whether questions may be put to witnesses who are now or who have been members of the Executive Council of Nova Scotia, relating to Cabinet discussion on the Marshall case, March 17, 1988

(Transcript, Page 10502)

We have been asked to rule whether questions may be put to witnesses who are now or who have been members of the Executive Council of Nova Scotia, relating to Cabinet discussions on the Marshall case. Arguments have been made by Commission counsel, and counsel for Donald Marshall, Jr., the Union of Nova Scotia Indians, the Black United Front and Oscar Seale in support of admitting such evidence, and from counsel for the Attorney General and the RCMP against the proposition.

Two decisions of the Supreme Court of Canada are relevant to the issue and have been considered by us in making our ruling:

Smallwood v. *Sparling et al.*, [1982] 2 S.C.R. 686;
Carey v. *Ontario*, [1986] 2 S.C.R. 637.

These were the only two cases referred to us by counsel. Both cases clearly state that there is no absolute immunity attaching to Cabinet documents which could prevent, in all cases, their introduction as evidence. While these cases recognize that such documents must be protected in certain circumstances, they make quite clear that the public interest is a paramount factor that must be considered in deciding the extent of the protection afforded in particular cases. LaForest, J. at p. 670 of the *Carey* case articulates factors that must be considered. He said:

> [*The* Smallwood] *case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.*
>
> *To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice.*

Here, we are not asking for disclosure of Cabinet documents. Cabinet documents relating to the Marshall case have been provided to the Commissioners, who have determined which are relevant to the work of this Inquiry. The Attorney General's Department has been supportive of our attempt to bring relevant documents, from Cabinet and from other Government offices, to this Inquiry. Counsel for the Commission has now asked that in addition to the Cabinet documents, questions be put to a former Attorney General relating to discussions held in Cabinet to give a sense of the general views being expressed in those discussions, but without "naming names" or attributing particular points of view to particular individuals. Counsel for Mr. Marshall has gone a further step and has asked the Commissioners to rule that there is no privilege attached to any Cabinet discussions. Thus counsel would be free to ask for specifics of Cabinet discussion attributable to individual ministers.

In determining whether the relative immunity relating to Cabinet secrecy will be extended to the oral evidence requested in this case, we must first look to the Terms of Reference of this Commission. Our task is to look at matters relating to the wrongful conviction of Donald Marshall, Jr. and "such other related matters which the Commissioners deem relevant to this Inquiry". Among those matters which the Commissioners deem relevant are the Reference to the Appeal Division of the Nova Scotia Supreme Court and the process by which compensation was granted to Donald Marshall, Jr. Surely it was in recognition of the public interest in airing the Marshall matter once and for all that the Government appointed this Inquiry. It is our view that it is clearly in the public interest that these matters concerning the administration of justice of Nova Scotia - and the extremely important consideration that the public have confidence in their justice system - must be raised.

While the more recent *Carey* case deals with the production of Cabinet documents, the *Smallwood* case deals with a subpoena issued to a former provincial Cabinet member to testify before a federal commission. In that case, Madame Justice Wilson says at p. 706:

> *It appears to me that, in the absence of any statutory provision which would override the common law, the rule with respect to oral testimony is the same as the rule with respect to documents, i.e., it is the rule of 'relative immunity'.*

In that case, the Supreme Court of Canada decided that Mr. Smallwood's claim to blanket immunity must fail. In our view, the position of counsel for the Attorney General's Department in invoking absolute privilege as against the Commission which it established, is similar to the approach taken by Mr. Smallwood, which was rejected by the Supreme Court of Canada when it said that he "cannot be the arbiter of his own immunity".

We are sympathetic to the "candour" argument (as was the Supreme Court of Canada) but find that it, when weighed against the public interest argument put by Mr. Spicer, must fail. We note specifically the comments of Mr. Justice LaForest at p. 673 of *Carey*. His comments might have been spoken by the Commissioners in this case:

> *As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct of the government...*
>
> *Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. ...It has a bearing on the perception of the litigant and the public on whether justice has been done.*

The limited immunity which now attaches to Cabinet documents and discussion in this case is outweighed by the public interest in the Commission having this evidence before it. In as much as we now wish to know the general nature of Cabinet discussions on the Marshall case, we will not permit questions relating to the views of individual Cabinet ministers, as this would lead to the possibility of hearing evidence from *all* ministers to "set the record straight". Not only would such individual views be irrelevant to this Inquiry, but this process would so encumber this Commission as to lead to absurdity. Further, Cabinet members should be protected from public scrutiny in their discussion leading to the formulation of government policy and in other matters such as, for example, national security. In this case, the public interest argument is such that the limited protection granted should enable this Commission to hear evidence relating to what issues dealing directly with the Marshall case were discussed in Cabinet, and what views were considered in arriving at particular decisions or policies. We feel that this maintains the appropriate and necessary balance between the interests protected by Cabinet secrecy and our interest in the proper administration of justice.

In summary, while former and present members of Cabinet may be asked questions dealing directly with the Marshall case, they will not be required to reveal the opinions or comments of individual members of Cabinet expressed during Cabinet meetings.

C. On the matter of excluding television cameras during the testimony of John Pratico, September 18, 1987

(Transcript, Page 1323)

This is an application made by Commission counsel on behalf of John Pratico who will be a witness before this Commission, that television cameras be excluded while John Pratico is testifying and that he not be subjected to television lights during that period.

According to the evidence available to this Commission, John Pratico is admittedly a fragile individual who has a long history of mental instability. His psychiatrist, Dr. M. A. Mian, Medical Director, Cape Breton Hospital, in his written opinion based on John Pratico's past history and his present clinical condition, states that in his professional opinion:

> *...it will be detrimental to his mental health and his testamentary capacity if he is given television exposure.*

The chief concern of this Commission is to obtain the facts. Freedom of the press [requires the] right to report fully. In that regard, this Commission has had, in my view, the maximum public exposure, the maximum coverage by the media with unrestricted right of access that has been enjoyed before any Canadian Commission.

The right of the press to report fully is secondary only to the Commission's duty to ensure that all relevant evidence is given freely and [without inhibition].

Commission counsel's motion would in no way prevent the media from reporting fully upon the proceedings. It would merely ensure that a witness be allowed to testify without such testimony being impeded by floodlights.

In our view, the public can best be served and protected and the adjudicative role of this Commission discharged fairly and properly by granting the application of John Pratico. It is ordered, therefore, that the order requested by Commission counsel on behalf of John Pratico is granted. There is no order as to costs at this time.

D. On the matter of excluding television cameras during the testimony of Donald Marshall, Jr., June 27, 1988

(Transcript, Page 14350)

Ms. Anne Derrick, as counsel for Donald Marshall, Jr., applies for an order that television cameras and still cameras be excluded from the hearing room while her client is testifying. Her request is objected to by counsel for the Canadian Broadcasting Corporation and ATV. Other counsel for parties with standing did not object to Mr. Marshall's application.

The position put by Ms. Derrick and corroborated by the report of Kris Marinic, a psychologist, is that at this time Donald Marshall, Jr. is "excessively worried, anxious and fearful as well as fatigued and wasted." It is the opinion of Mr. Marinic that Donald Marshall's condition has deteriorated since he last saw him and that Donald Marshall seems to be particularly afraid of the humiliation associated with even further public exposure. Mr. Marinic concludes his report, which is in evidence as Exhibit 163 as follows when referring to Donald Marshall, Jr.:

> *Given his past experience and the ongoing current stress, in my opinion, the exposure to television cameras and bright lights would compromise his ability to testify. Most likely, his level of anxiety would adversely affect his speech, concentration and memory.*
>
> *Consequently, not only would he endure more distress, the quality of his testimony would also suffer.*
>
> *I therefore, recommend that the television equipment be turned off during Mr. Marshall's testimony.*

As was said by this Commission when dealing with a similar application on behalf of John Pratico, the right of the press to report fully is secondary only to the Commission's duty to ensure that all relevant evidence is given freely and [without inhibition]. Commissions counsel would in no way prevent the media from reporting fully upon the proceedings. It would merely ensure that a witness be allowed to testify without such testimony being impeded by floodlights.

In that context and based on representations we have heard, we conclude that television cameras and floodlights should be excluded from the hearings to ensure that the Commission obtains that best uninhibited testimony possible from Donald Marshall, Jr.

With respect to the application to exclude still cameras we are not persuaded that their presence will be detrimental to the quality of Donald Marshall, Jr. testifying, provided only one still camera is present in the hearing room at any one particular time and is operated without the benefit of flood, flash or strobe lights and in a manner acceptable to the Commission as being reasonable.

It is ordered, therefore, that television cameras and floodlights be excluded from the hearing room while Donald Marshall, Jr. is testifying before this Commission.

11
Research Program

Public Policing in Nova Scotia

(Volume 2 of this Report)

Researchers

Richard Apostle
Associate Professor, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Philip Stenning
Associate Professor, Centre of Criminology, University of Toronto, Toronto

Executive Summary

In this study, we examine the major issues involved in choosing a policing philosophy for Nova Scotians. We conclude that the philosophy which is currently reflected in legislation and in police organization and practices in Nova Scotia - according to which local autonomy, variety and choice, are given preference, but are preferred in the context of a significant measure of provincial oversight and influence - is essentially well suited to the policing needs of Nova Scotia. For these reasons, we do not recommend any fundamental changes in the overall structure of the present policing system in the province. Nevertheless, certain changes in policing policy for the province, and in the way it is determined and implemented, are now required. The principal thrust of the recommendations we make is to strengthen, build on and improve the basic structures which are now in place.

While favouring local choice in policing policy and institutions, we also favour a more effective provincial presence and influence over policing policy. This involves adopting reforms which will give the existing provincial bodies more resources to exercise the powers and authority which they already have under the current legislation and contractual (in the case of the RCMP) frameworks. A philosophy of policing, however good it may be in theory, is of little value in the absence of the resources and will which are necessary to implement it. The provision and allocation of adequate resources for effective policing in the province must be a central concern of this Royal Commission in making its recommendations in this area, and of the Government of Nova Scotia in responding to them.

Major Provincial and Municipal Agencies

Among our various recommendations, we give special attention to the need to provide the Nova Scotia Police Commission (NSPC) with adequate personnel and resources to carry out its legislated mandate. The essential benefit of provincial police commissions when they are functioning as they should, draws from their ability to function as sources of independent advice and assistance in resolving the kinds of tensions which inevitably arise between provincial and municipal authorities out of their shared responsibilities for policing. Any attempt by the Department of the Solicitor General to assume the role of the Police Commission in this respect will fundamentally erode this important source of independent advice and assistance. We also recommend that the new Police Review Board should have the requisite independence from the police community and from Government (including the Nova Scotia Police Commission) to be an effective agency. In addition, we make several recommendations designed to ensure capable Board members and staff.

At the same time, we do recognize that the Solicitor General remains the executive authority with ultimate responsibility for determining and approving the implementation of provincial policy. The "mixed" system of policing in Nova Scotia, and the particular responsibilities which the Solicitor General has assumed from the Attorney General for the RCMP, ensure that there will be many other sources of policy ideas on which she/he will want to draw. In order to receive, sift through and synthesize the information and advice coming from these different sources, identify areas in which there appears to be insufficient information and advice, and take steps to seek out that which is needed, the Minister requires appropriate support services within his/her own Department. To provide for the effective fulfillment of the Solicitor General's executive responsibilities in this regard, we make a series of recommendations, the most important of which is establishing within the Department a position of Executive Director, Policing. The duties of this official should relate exclusively to the fulfillment by the Department of its responsibilities with respect to policing. In conjunction with the creation of the new office and Department of the Solicitor General, we have also recommended the Government carefully review the Police Act and Regulations, and the Provincial Municipal Policing Agreements. The Government should ensure that those powers and responsibilities which formerly belonged to the Attorney General, and which relate primarily to the provision of legal advice and the administration of justice in particular cases, remain the responsibility of the Attorney General and not be transferred to the Solicitor General.

Our research indicates that there is an absence of adequate standards, guidance and support for municipal police governing authorities. We believe that one of the best vehicles for developing standards for municipal police governance would be an active association of municipal police governing authorities, which would provide a forum for the sharing of common experiences and problems and the development of common solutions to these problems. We have therefore recommended that a Municipal Police Governing Authorities Association (MPGAA) of Nova Scotia be formed, with a small staff (e.g., a full time Executive Director, a Research Officer and a Secretary), and with a mandate to provide advice, information and educational services (e.g., through an Annual Conference, regional meetings, etc.) to municipal police governing authorities throughout the province.

Police Organization

One of the real strengths of municipal police department (MPD) organization - providing immediate response to citizen and community concerns - is also a source of some weakness. The focus of most MPDs on providing immediate responses to difficulties as they arise means that they are not as inclined to undertake long-term planning. Neither are they as likely to do systematic evaluations or audits of their performances. There is a need for MPDs to have more deliberate planning processes, and monitoring of the successes and failures of departmental plans. This planning should involve the specification of departmental goals and priorities. It should also lead to the construction of an objective set of job descriptions, job standards, and appraisal systems for evaluating job performances.

Further, the evidence presented in our study demonstrates that small MPDs with low pay standards have the least qualified personnel and low morale. These small MPDs should be encouraged to improve their pay standards (bearing differential living costs in mind). This will require provincial financial support, but it will help ensure the quality and morale of the new personnel joining MPDs.

Another issue which needs to be addressed at the MPD level concerns the inadequacy of their pension plans. A substantial majority of the MPDs now have pension plans, but many of them, particularly in the smaller departments, are quite new. As a consequence, older members of the MPDs stand to gain little from the plans. Poor pensions affect recruitment, lower morale, and force older men who ought to be moving towards retirement to continue working. An additional problem for many MPDs arises from the considerable penalty clauses for early retirement (almost always defined as prior to 65 years of age). We have recommended that the Nova Scotia Police Commission, with its renewed research mandate, should undertake a comprehensive evaluation of MPD pension plans in cooperation with the Chiefs of Police Association of Nova Scotia (CPANS), the Canadian Union of Public Employees (CUPE), the Police Association of Nova Scotia (PANS) and the proposed Municipal Police Governing Authorities Association (MPGAA). Special attention should be devoted to providing retirement packages for approximately 100 older MPD members (over 50 years of age), and the removal of penalty clauses for early retirement.

In terms of MPD training, we support the need to utilize a regional Police Academy, as well as other available institutions, to establish and maintain the standards being developed by the NSPC. The region is sufficiently small that any attempt to decentralize training will jeopardize what has been accomplished to date. Since criticisms have been made of the training offered by the Atlantic Police Academy, we have recommended that the Solicitor General's Task Force combine its study of training with an assessment of the existing studies on the financial costs to the Province of Nova Scotia for the Atlantic Police Academy's programs.

In terms of investigative capacity and organization, it is clear that the high level of autonomy in detective work which existed in Sydney in the early 1970s does not currently exist in the province. Serious criminal investigations are now subject to closer scrutiny by senior members of all MPDs in the province; however, most MPDs still have not established formal policies or reporting procedures for investigative work. In keeping with the earlier recommendation regarding department plans, we have recommended that MPDs should cooperate with the Nova Scotia Police Commission to produce a uniform set of guidelines for investigative work.

Police/Minority Relations

Our analysis of national data on police racial attitudes, as well as our qualitative data from Nova Scotia, suggests that we can anticipate the continuing existence of negative perceptions of visible minorities. Insofar as the police share community norms, which are prejudiced in a variety of ways, there will be no easy solutions for police/visible minority group relations. Some of the programs now in place are a move in the right direction, but the prospect that another Marshall case may occur because of negative attitudes Whites have towards visible minorities in Canada is one which must be taken seriously.

In view of the current distribution of visible minority group members, and the shortfalls now evident in police/minority relations in the province, we have recommended that special attention should be given to more intensive training for cadets whose first assignment will be in areas of high visible minority concentration. In addition, Detachments and MPDs located in areas of high visible minority concentration should allocate proportionally more of their resources to multicultural training. This training should recognize the considerable differences in the situations and experiences of different visible minority groups in the province. Detachments and MPDs will be individually responsible for ensuring that training in minority issues is delivered on a timely basis. The NSPC will monitor Detachment and MPD performance in this area.

While we recognize that negative racial attitudes go beyond questions of stereotyping, we have also recommended that all MPDs promulgate official policies on stereotyping similar to the ones currently adopted by the RCMP (RCMP Administration Manual III.9) or the Metropolitan Toronto Police Force (Standing Order Number 24).

The analysis we have presented in our study shows that MPDs in the province are generally as progressive as those elsewhere in the country (and in some instance, more progressive) in recruiting members of visible minority groups. Furthermore, these minority group members are generally employed in communities which have larger minority group populations. Nevertheless, there are still units which are nowhere close to being representative of the communities they serve. We have therefore recommended that recruitment of visible minority group members and women should be actively encouraged by both police and government organizations. Both the RCMP and MPDs in the province should establish specific recruitment targets which reflect the distribution of various minority groups in the population. We have also recommended that particular attention should be given to using outreach recruitment methods.

Conclusion

It is clear that our recommendations, taken as a whole, will require substantial additional resources is they are to be implemented. Quality policing cannot be achieved through neglect, and our view is that if quality policing is what Nova Scotians want, they and the Government will have to take more realistic attitudes towards the costs involved.

Peer Review Workshop

An early draft of the research on "Public Policing in Nova Scotia" was vetted by an invited group of police professionals, academics and other interested persons. A workshop to discuss the research was held on August 31, 1988. The following is a list of participants at that workshop:

Researchers

1. *Richard Apostle*, Associate Professor, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

2. *Philip Stenning*, Associate Professor, Centre of Criminology, University of Toronto, Toronto

3. *Don Clairmont*, Professor, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Reviewers

1. *Professor Jean-Paul Brodeur*, Directeur, Centre Internationale de Criminologie Comparée, Université de Montréal
2. *C. L. Campbell*, Director of Atlantic Police Academy, Charlottetown
3. *Chris Murphy*, Associate Professor, University of Kings College, Halifax

Invited Participants

1. *Bruce Archibald*, Associate Professor, Dalhousie Law School, author of the Royal Commission research study: "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia" (Volume 6 of this Report)
2. *Superintendent D. Bain*, OIC Administration and Personnel, 'H' Division, RCMP
3. *James Bissell, Q.C.*, Director, Atlantic Region, Justice Canada; Counsel to the RCMP
4. *R. Gerald Conrad, Q.C.*, Executive Director (Legal Services), Department of Attorney General, Province of Nova Scotia
5. *Nadine Cooper-Mont*, Deputy Solicitor General, Province of Nova Scotia
6. *James Crosby*, Canadian Union of Public Employees
7. *Anne Derrick*, Counsel to Donald Marshall, Jr.
8. *Chief Superintendent Don Docker*, Corporate Planning Branch, RCMP Headquarters, Ottawa
9. *David Fisher*, Counsel to the Police Association of Nova Scotia (PANS)
10. *Inspector E. G. Grant*, Acting OIC Criminal Operation, 'H' Division, RCMP
11. *Martin Herschorn, Q.C.*, Director (Prosecutions), Department of Attorney General, Province of Nova Scotia
12. *Burnley (Rocky) Jones*, Black United Front
13. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
14. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
15. *Admiral H. Porter*, former Chairman, Nova Scotia Police Commission
16. *Murray Ritch*, Acting Chairman, Nova Scotia Police Commission
17. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
18. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
19. *George Smith*, Acting Executive Director, Nova Scotia Police Commission
20. *Al Swim*, Director Personnel and Training, Nova Scotia Police Commission
21. *Chief Harry Vickers*, President, Nova Scotia Chiefs of Police Association
22. *Kit Waters*, Director of Policy and Planning, Department of the Solicitor General, Province of Nova Scotia
23. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

The Mi'kmaq and Criminal Justice in Nova Scotia

(Volume 3 of this Report)

Researcher

Dr. Scott Clark, G. S. Clark and Associates, Ottawa

Executive Summary

Part 1 of the report deals with the organization of the study. The approach involved focussing on three reserves (Eskasoni, Membertou and Shubenacadie) as rural, urban and semi-urban communities, respectively. Halifax was included as one of the communities for study because of the increasing number of young Native people moving between the city and their reserves. The study concerned aboriginal people living both on and off reserves as "status" and "non-status" Indians. The study was limited, however, in its work with off-reserve individuals.

Four types of information collection were used in the study: interviews, document review, statistical review, and literature review. Interviews were held with Native people and justice system personnel throughout the province, with a particular focus in the three selected reserve communities and Halifax. The interviews provided the most useful evidence, while the statistical review yielded very little useful information due largely to the fact that most Provincial Government data do not specify whether the individual involved in the justice system is Native or non-Native.

The study employs the concept of *adverse effect* in recognition of the facts (a) that the intent to discriminate is very difficult to prove, and (b) that discrimination may be only one of several causes that result in adverse effects for Natives involved in the criminal justice system. The focus is on systemic or structural problems.

Part 2 briefly examines the aboriginal context in Canada. Canada's aboriginal population of approximately 1,390,000 (in Nova Scotia approximately 11,000) is highly over-represented in federal prisons on a national basis. Similarly, aboriginal people, particularly in their reserve communities, endure socio-economic conditions unthinkable in the rest of Canadian society. These conditions result in much higher suicide rates, alcoholism and family breakdown rates than for Canada as a whole. Ultimately, these conditions bear on the relationship between Native communities and crime.

Section 91(24) of the *Constitution Act, 1867* confers exclusive legislative jurisdiction on the Federal Government with respect to Indians (i.e., status Indians living on-reserve and off-reserve) and lands reserved for Indians. However, currently provincial governments take primary responsibility for the provision of services to status Indians living off-reserve. Aside from some specific on-reserve services provided by the provinces, the Federal Government through the Department of Indian Affairs and Northern Development takes primary responsibility. Federal policy is implemented through the *Indian Act* which enables Band governments to manage most programs on-reserve.

A number of items of unfinished business remain between aboriginal groups and the Federal Government. Priority concerns are constitutional issues, particularly as they relate to aboriginal and treaty rights and claimed rights to self-government, land claims, Indian self-government arrangements, and socio-economic conditions in Indian communities. However, progress has been very slow on these issues because, in large part, of both federal and provincial inabilities to agree on jurisdiction and the authority that should be accorded Indian community governments.

In terms of justice issues, it would appear that federal law will remain supreme on lands reserved for Indians to the extent that Parliament so legislates by virtue of its Section 91(24) authority. As a result it is arguable, for example, that no provincial law may directly or indirectly interfere with a duly enacted "federal" self-government regime on "lands reserved for Indians", including provisions relating to the administration of justice.

In reality, practical considerations will temper these absolute legal concepts, especially in areas relating to the administration of justice. In particular, because of current shared funding arrangements and current shared jurisdictions, the active cooperation of provincial authorities will be essential to the effective exercise of future aboriginal legislative authorities relating to justice matters.

Part 3 of the report introduces the Mi'kmaq context, including the historical relationship between the Mi'kmaq and White society and government, and the current situation facing the Mi'kmaq people. Historically, there has been a process of economic underdevelopment in Mi'kmaq communities. This process has inevitably led to dismaying standards of living characterized, for example, by an unemployment rate in reserve communities of well over 50 percent. When also faced with severe restrictions on their abilities to hunt and fish due to provincial legislation and non-recognition of treaty rights, the unemployment figures become even more significant.

The 13 Bands in Nova Scotia are represented by two umbrella political organizations: the Union of Nova Scotia Indians and the Confederacy of Mainland Micmacs. Aboriginal people living off reserve are represented by the Native Council of Nova Scotia. The Grand Council of the Mikmaw Nation is a long-standing advocacy organization representing all Micmacs.

The three focus reserve communities are examined and are seen to have a number of under-resourced social service programs. Each is represented by a different type of police force: Membertou is policed by the Sydney City Police; Eskasoni by its own Band Police; and Shubenacadie by the RCMP through its Special Constable (i.e., Native) program. Crime rates are significant given the populations but tend to be primarily property offences, followed by assaults.

Part 4 examines the adverse effects for Natives of being involved in the criminal justice system in Nova Scotia. It is stressed at the outset that problems, needs and solutions must be viewed in a community-specific way due to the variation among Native communities on each of these factors. Second, it is noted that in Nova Scotia, as in other parts of the country, a high proportion of Native offences are alcohol related. This might not only reflect the living conditions faced by Native people, it may also result in differential processing by the police, the courts and social services, as has been suggested by other studies in Canada.

Each type of policing represented in the three focus communities and in Halifax appears to have its own deficiencies. The initial question for people living in the communities is: are police supposed to enforce the law, or are they supposed to act first as mediators? This dilemma can result in poor police-community relations, especially in cases where the police constable is from the community he/she is policing.

There are also problems arising from inadequate training, particularly in the areas of interpersonal relations and group dynamics - skills which could contribute successfully to conflict resolution in reserve communities.

Response time to calls from reserves tends to be slow, except in Eskasoni which has a resident police force. The problem may be connected to a certain degree of stereotyping by police that the problems on-reserve are relatively insignificant and will usually have "blown over" by the time the police arrive. This is particularly important when it is realized that no crisis facilities such as women's shelters exist on the reserves. The police, therefore, are the only institutional avenue available to people in immediate danger.

With regard to sentencing, the study was not able to reach conclusions about whether or not there exists sentencing disparity (Native/non-Native) in Nova Scotia. Interviews with Crown prosecutors and defence counsel did, however, suggest that judges apply different criteria for Natives and non-Natives in their sentencing. In the case of some judges, this favoured Native people; in others it did not. In this connection the imposition of fines is particularly problematic for Native people given their significantly lower income levels compared to non-Natives.

With respect to probation, a disparity was seen in the preparation of pre-disposition reports and pre-sentence reports in that fewer relevant informants were contacted in Native communities than in non-Native cases. As well, options to incarceration are essentially non-existent in Native communities which do not enjoy the same level of fine option and Alternative Measures programs as are available to non-Native communities.

Similarly, there are few institutional supports for offenders returning to their reserves, a fact that tends to be noted by parole officers in the preparation of their assessments. Further, parole officers are obliged to account for prospects for employment in their assessments, a factor which is essentially not applicable to reserve communities. These questions are therefore automatically loaded against Micmac interests in their applications for parole.

Aftercare programs designed to meet the needs of Micmac individuals and communities are non-existent except for the overburdened and underfunded Micmac Friendship Centre in Halifax. This is a real concern in light of the increasing numbers of young Micmacs entering the correctional system.

Access to legal counsel is not a major problem in Nova Scotia except to the extent that legal aid lawyers are generally overburdened with cases and often unable to spend the required time with clients (Native or non-Native). Problems of communication do occur, however, based on a lack of understanding by counsel of the context in which Native people live, and by the client of the role of counsel. Again, this is a reflection of inadequate time available to legal counsel to spend with individual clients. It also suggests the need for public legal education directed at Native people, particularly the young.

Conceptualization of the judicial process and language are common barriers in the courtroom, as well. This is true to the extent that due process can be called into question in some cases. The fact that a Native person has never been called to serve on a jury in Nova Scotia also raises serious questions about the judicial process.

The relevance of the judicial process is a general issue raised frequently by Micmac leaders and others. Because the courts are often some distance from reserves (e.g., Eskasoni), it is often difficult for people to attend court as accused, witnesses or observers. The court, which is already unfamiliar and somewhat intimidating, is physically and conceptually removed from the indigenous processes of social control based on mediation and restitution. Community justice processes are ignored as non-Natives dispense their form of justice in Native communities. Restitution in the form of fines is made to the State, not to the offender's community or to the individual victim. In summary, Natives believe that they have no stake in the court process.

Indigenous processes of conflict resolution such as the extended family and mediation/reconciliation are seen to offer opportunities for the development of community-based justice processes. This is especially timely in view of the self-government development initiatives that are being taken in other parts of the country and that are currently being taken in unique ways in Micmac communities.

Part 5 examines responses to the problems. By way of preamble, the report notes that the challenge for Native groups, including the Micmac, is to define "appropriate justice processes" to suit the needs of their communities. A further challenge exists for the same aboriginal groups and for the Federal and Provincial Governments to reach agreement on new structural relations that will enable changes to be made and to continue working. This will necessarily involve more than the simple "indigenization" for the existing system (i.e., replacing non-Native personnel with Native personnel who would perform the same functions). Finally, it must be recognized that the primary causes underlying problems for Natives in the justice system are related to social and economic conditions, not to the justice system *per se*. It is there that we must focus much of our attention.

In addition to that major area of concern, there are certain outstanding issues that must be resolved:

1. The implementation of an effective constitutional process enabling self-government for aboriginal nations - in order that community governments can plan, coordinate and control policies and programs for their people;

2. The recognition of other aboriginal rights referred to in the *Canadian Charter of Rights and Freedoms* - in order that aboriginal people can again derive economic and cultural strength from their land and resources;

3. The recognition by the Province of Nova Scotia of Micmac treaty rights - in order that the Micmac can exercise their territorial rights to their land base. The current impasse in this area is exemplified in the *Simon* case.

The development of community-based justice systems covers a wide range of possibilities from the implementation of new programs such as alternative measures for young offenders to the application of Micmac customary law through tribal courts. The rate of development leading to a Micmac justice system would be determined by a number of factors:

1. The will and abilities of Micmac people and their leaders to move in this direction;

2. The political will of the Federal and Provincial Governments to resolve outstanding issues and to support the development of an aboriginal justice system;

3. The will of the people of Nova Scotia to support such a development;

4. The identification (and, if necessary, the institution) of a body to do the required development work;

5. The establishment of a tripartite forum (Micmac/Federal/Provincial) for the discussion and negotiation of a Micmac justice system.

The report examines the range of possibilities for the development of community-based or tribal courts, community-based policing, a community-based Native Court Worker program, diversion, fine option and alternative measures programs, and Native Justices of the Peace. Prior and ongoing examples from other parts of the country are examined. More work is required before the applicability and the nature of such developments can be determined. The way to begin, however, is to start tackling some of the problems already defined by initiating pilot projects and closely evaluating the results.

Part 6 of the report presents findings and recommendations.

Peer Review Workshop

An early draft of the research on "Mi'kmaq and Criminal Justice in Nova Scotia" was vetted by an invited group of academics, community leaders and other interested persons. A workshop to discuss the research was held on June 16, 1988. This discussion was considered in preparing later drafts of the research. The following is a list of participants at that workshop:

Researcher

Dr. Scott Clark, G. S. Clark and Associates, Ottawa

Reviewers

1. *Dr. Carol LaPrairie*, Senior Policy Analyst, Justice Canada, Ottawa
2. *James R. MacLeod*, Native lawyer and member of Evaluation Steering Committee, Northern Paralegal Project; Taylor, McCaffrey, Chapman, Winnipeg
3. *Professor Fred Wien*, Vice-Chair, Dalhousie Senate; former Director, Maritime School of Social Work, Dalhousie University, Halifax

Invited Participants

1. *Marie Battiste*, Ph.D. Ed., Eskasoni
2. *Alison Bernard*, Chief, Eskasoni
3. *Alex Christmas*, President, Union of Nova Scotia Indians; former Chief, Membertou
4. *Dan Christmas*, Executive Assistant to President, Union of Nova Scotia Indians
5. *Allan Clark*, Provincial Coordinator for Native Affairs, Department of Community Services, Nova Scotia
6. *Alex Denny*, Grand Captain of Grand Council of the Mikmaw Nation
7. *Anne Derrick*, Counsel to Donald Marshall, Jr.
8. *Noel Doucette*, Commissioner of the Nova Scotia Human Rights Commission; former President of Union of Nova Scotia Indians and former Chief, Chapel Island
9. *Bernie Francis*, representing Terry Paul, Chief, Membertou
10. *Roderick Googoo*, Vice-President, Union of Nova Scotia Indians; Chief, Whycocomagh
11. *Sakej Henderson*, Advisor and non-practicing lawyer representing the Grand Council of the Mikmaw Nation
12. *Russell Juriansz*, Lawyer, Blake, Cassels and Graydon, Toronto; former General Counsel, Canadian Human Rights Commission
13. *Doug Keefe*, Department of the Attorney General, Province of Nova Scotia
14. *John Knockwood*, Chief, Shubenacadie
15. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
16. *Reg Maloney*, Vice-President, Union of Nova Scotia Indians; former Chief, Shubenacadie
17. *Catherine Martin*, Coordinator, Micmac Professional Careers Project, Henson College, Dalhousie University
18. *Graydon Nicholas*, Counsel to the Union of Nova Scotia Indians
19. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
20. *Viola Robinson*, President, Native Council of Nova Scotia
21. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
22. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
23. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

Discrimination Against Blacks in Nova Scotia: The Criminal Justice System

(Volume 4 of this Report)

Researchers

Dr. Wilson Head, President, Federation of Race Relations Organizations; formerly of the Faculty of Social Work, Atkinson College, York University, Toronto

Winston Barnwell, Department of Education, Dalhousie University, Halifax, Research Assistant

Professor Don Clairmont, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Executive Summary

This study of Blacks and the Criminal Justice System in Nova Scotia had as its chief objective a systematic description and analysis of the attitudes, experiences and suggestions of Blacks, especially with respect to the police, courts and the correctional system. It has been guided by several general hypotheses and employed a variety of research methodologies. Attention has been given also to historical and contextual considerations including the history of the Black experience in Nova Scotia, current demographic and socio-economic patterns and the comparative views and experiences of the majority White population.

The three major research strategies employed were in-depth interviews with especially informed individuals and focus groups, a large survey of Blacks and non-Blacks in selected areas of Nova Scotia, and an examination of racial differences in sentencing for theft convictions in the Halifax/Dartmouth metropolitan area. In addition, as a companion piece to this study, an additional and more intensive analysis of sentencing patterns in the case of assault convictions was subsequently conducted. Overall, the diverse methodologies strongly supported the study's guiding hypotheses and yield a consistent set of findings. These results are systematically detailed in summary form in Part 5 of this Report. Prejudice and discrimination against Blacks in all major institutional sectors of society, including the criminal justice system, is perceived to exist by the population at large, more so among Blacks but commonly by non-Blacks as well. As indicated in the special in-depth key informant interviews, the existence of prejudice and discrimination in the justice system is confirmed by those most experienced with all aspects of the justice system. The examination of sentencing patterns also indicated that, whatever the ultimate reasons may be, whether strictly "legal" or reflective of socio-economic and other "extra-legal" factors, for the same type of offence Blacks received somewhat more severe sentences and were less likely to receive the more lenient type of sentences (i.e., discharges).

In advancing recommendations the authors have taken into account not only the views of participants in this research but also the considered experiences of scholars and practitioners from elsewhere in Canada. In "placing" the recommendations, three important contextual factors and three major issues were noted. The former included the long history of the burden of Blacks' oppression (from slavery and Jim Crow practices to economic marginality and continuing socio-economic disadvantage), the fact that Blacks constitute a relatively small proportion of the Nova Scotian population, and the pattern of a limited, reactive approach to prejudice and discrimination on the part of government departments and agencies and within the criminal justice system *per se*. The major issues cutting across all areas of recommendations, be they the police, courts, correctional system or monitoring agencies, included the emphases accorded to technical/liberal (education, public awareness) as opposed to power (new laws, putting Blacks in

positions of influence) strategies, dealing at the individual or at the structural level, and the extent to which changes and reforms must also be programmed and aggressively monitored.

Detailed recommendations were advanced with respect to policing and the court system since these were the two areas highlighted in the research. Concern was focussed on police standards, police training in the areas of human rights and multiculturalism, and the relatively impermeable ethos and structure of the police organization vis-à-vis Blacks and other special groups. Better training both at the entry level and beyond, more minority presence in police organizations, more positive leadership by the Police Commission and police management, and more independent civilian review of police actions were called for. Most importantly perhaps was the clear need for more contact and linkages of an everyday sort where input and understanding could develop. At the level of the court system similar recommendations for training, sensitivity, minority representation, and aggressive proactive leadership were noted. In addition, specific recommendations were advanced concerning the appointment of special court workers to liaise with offenders and regularly report on proceedings, the shoring-up of legal aid resources and the development of a fine option program. As for the correctional system, in addition to similar recommendations, it was noted with regret that there seems to have been a move away from the rehabilitative emphasis and that two local programs which assisted the Black inmate/ex-inmate have recently been terminated for lack of resources; programs such as these need to be strengthened, not eliminated.

In addition to the police, courts and correctional systems, there are important roles related to management, planning and monitoring of the criminal justice system. Much more should be done in these areas by the Nova Scotia Police Commission, the Attorney General, the Human Rights Commission and perhaps the Ombudsman's Office. Detailed recommendations have been advanced with respect to these organizations. Of course the criminal justice system is but one institution of society. Important changes have to be made to eliminate prejudice and discrimination in education and employment. Making changes, eliminating prejudice and especially discrimination requires vigorous pressure by Blacks themselves. Most importantly they require strong leadership by the Provincial Government. Benign neglect as a strategy will not do.

Peer Review Workshop

An early draft of the research on "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" was vetted by a group of academics, community leaders and other interested persons. A workshop to discuss the research was held on June 15, 1988. This discussion was considered in preparing later drafts of the research. The following is a list of participants at that workshop:

Researchers

1. *Dr. Wilson Head*, President, Federation of Race Relations Organizations; formerly of the Faculty of Social Work, Atkinson College, York University, Toronto

2. *Winston Barnwell*, Department of Education, Dalhousie University, Halifax, Research Assistant

3. *Professor Don Clairmont*, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Reviewers

1. *Dr. P. Anthony Johnstone*, Executive Director, Nova Scotia Human Rights Commission
2. *Dan McIntyre*, Race Relations Commissioner, Province of Ontario
3. *Professor G. L. Watson*, Department of Sociology and Anthropology, University of Prince Edward Island

Invited Participants

1. *Bruce Archibald*, Associate Professor, Dalhousie Law School, author of the Royal Commission research study: "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia" (Volume 6 of this Report)
2. *Yvonne Atwell*, President, Black United Front
3. *Jacqueline Barkley*, Department of Social Work, Izaak Walton Killam Children's Hospital
4. *Delvina Bernard*, Program Coordinator, Youth Employment Skills Canada Inc., Halifax
5. *Anne Derrick*, Counsel to Donald Marshall, Jr.
6. *John Embree*, Department of Attorney General, Province of Nova Scotia
7. *Jim Fanning*, Department of Attorney General, Province of Nova Scotia
8. *Russell Juriansz*, Lawyer, Blake, Cassels and Graydon, Toronto; former General Counsel, Canadian Human Rights Commission
9. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
10. *James H. Morrison*, Dean of Arts, St. Mary's University, Halifax
11. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
12. *Joyce Robart*, Chairperson, Black United Front, Association of Black Social Workers, Halifax-Dartmouth Justice Committee
13. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
14. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
15. *Gerald M. Taylor*, Executive Director, Black United Front
16. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

Walking the Tightrope of Justice

An examination of the Office of Attorney General in Canada with Particular Regard to its Relationships with the Police and Prosecutors and the Arguments for Establishing a Statutorily Independent Director of Public Prosecutions

A Series of Opinion Papers

(Volume 5 of this Report)

Researcher

Professor Emeritus John Ll. J. Edwards, Faculty of Law and Centre of Criminology, University of Toronto

Preface

Many inherent qualities, it may be surmised, are essential if public confidence in the administration of justice is to be sustained. Nowhere is this more evident than in the institution and conduct of criminal prosecutions. Among the central criteria by which the justice system is publicly judged are fairness and evenhandedness in the handling of the criminal proceedings, the absence of any perception of bias or political interference on the part of those exercising police and prosecutorial authority, as well as professional competence and integrity throughout the system. Not infrequently, the public focus is directed towards the highest echelons in the system and this perforce includes the Attorney General and the senior public officials in the department of government responsible for the machinery of justice.

Such has been the experience in recent years of several of the Canadian provinces, from the east coast to the west coast, but none have had to endure the intensity and depth of the public inquest established by the Government of Nova Scotia into all the circumstances surrounding the Donald Marshall, Jr., prosecution. This has led this Royal Commission to expand the range of its inquiry into all facets of the current provincial justice system and, in particular, the handling of other cases involving prominent political figures. Whatever the outcome of this prolonged public examination may be, and whatever recommendations emanate from this Royal Commission, it can be stated with total confidence that the ensuing implications will affect the future justice policies of every jurisdiction in Canada, federal as well as provincial.

The series of opinions contained in this volume represent my endeavours to assist the Commission of Inquiry in identifying the major points of weakness in the prevailing constitutional systems relating to the investigation and prosecution of crime. The opinions build upon my previous work as reflected in "The Law Officers of the Crown" (1964) and "The Attorney General, Politics and the Public Interest" (1984), both of which centred, in the main, on the English offices of the Attorney General, Solicitor General and Director of Public Prosecutions. It is to be noted, however, that the direct historical lineage between the original office of the Attorney General in England and Wales and that of its Canadian counterparts is expressly acknowledged in every federal and provincial statute that defines the functions, powers and responsibilities of the Attorney General in our constitutional arrangements. Accordingly, much attention is devoted in the chapters that follow to assessing the experience of the wide range of countries, throughout the Commonwealth and in the United States of America, which have adapted the role of the Attorney General to meet their individual circumstances.

A short while before my present association with this Royal Commission began, in the course of the Tenth Viscount Bennett Memorial Lecture at the University of New Brunswick in October 1986, I set forth some of the specific recommendations for change that I regarded as necessary conditions for the restoration of waning public confidence in the integrity of the justice system. Some of the provincial governments have seen fit to publicly adopt these suggestions for reform, or to indicate their intention of so doing. I cannot help, however, harbouring reservations as to the level of understanding that accompany the proposed reforms. Among the major questions that need to be addressed in any restructuring of the machinery of government in the justice area is the separation of ministerial responsibility, respectively, for policing and prosecutions, and determining the parameters for the new alignments. This move, begun by the Federal Government in 1966, has now been implemented by the majority of the provinces.

Another, and perhaps more contentious, issue is the problem whether to transform the office of Attorney General into a non-political, public service appointment or to retain its traditional status, so far as Canadian history is concerned, as an elective member of the Government, with a seat in the legislature and in the Cabinet. This subject, and the arguments that can be advanced in support of both sides of one of the central questions facing the Commission, *viz.*, the future role of the Attorney General in Nova Scotia, are canvassed fully in the concluding chapters of the present study. At the end I come down in favour of retaining the *status quo* so far as the Attorney General's membership in the Cabinet and the legislature is concerned. If the experience of a broad range of Commonwealth countries is reviewed, in which both the non-political and political models of the Attorney General's office are exemplified, the conclusion is inescapable that adherence to the fundamental qualities of independence and accountability are preeminently dependent upon the personal attributes and standards of the holder rather than adherence to an ostensibly non-partisan, non-political office of Attorney General. Even were the latter option to attract favourable support, if we accept the doctrine of ministerial responsibility to the legislative body as the bedrock of our system of parliamentary democracy, another Minister of the Crown would have to be designated in place of the Attorney General with all the same fundamental issues of direction and control remaining to be determined.

Far from dismissing constitutional principles and legislative prescriptions as important safeguards against abuses in the administration of justice, I devote considerable time in the opinions that follow to an analysis of the Director of Public Prosecutions as it has evolved in England, its original home, in many of the newly independent countries of the Commonwealth, and, notably in more recent years, in Australia at both the federal and state levels. It is worth noting at once that, during the period in which the present inquiry has been engaged in fulfilling its mandate, both the Premier of Nova Scotia and the Attorney General have publicly stated their ideas as to what changes would be necessary to avoid a repetition of the allegations associated with a number of high profile prosecutions in that province. At different times the emphasis has inclined towards the setting up of an independent Director of Public Prosecutions who would "report directly to the Legislature and have the same independence as the Auditor General and the Ombudsman". An alternative proposal has envisaged the creation of a United States styles Special Prosecutor's office - presently described as the office of Independent Counsel under U.S. federal laws - with more limited jurisdiction to handle politically sensitive prosecutions that involve senior officials in government. As will be seen in the ensuing series of opinions, I reject both these proposed solutions as inadequate to the pressing problems portrayed in the evidence tendered before this Royal Commission.

In my recommendations to the Royal Commission I have sought to adhere closely to the dual objectives of, first, ensuring ministerial accountability on the floor of the legislature, and since the advent of the Charter in the courts, for the exercise of prosecutorial power, and, secondly, reinforcing the realities of independence with respect to the handling of individual cases by the creation of a statutory office of Director of Public Prosecutions. I emphasize the statutory nature of the proposed office to distinguish it from the existing office that, in various provinces across Canada, bears the same title but which is held by a public servant with no statutory authority or security of tenure in his own right. I reject the notion of a Director of Public Prosecutions who is absolutely independent operating outside the ambit of the principles of ministerial responsibility. In short, the Attorney General will remain as the Minister of the Crown ultimately responsible to the legislature for the handling of every prosecution instituted or terminated at the instance of the State.

What is proposed is an office of Director of Public Prosecutions with functions, powers and lines of accountability spelt out in careful detail by way of a statutory enactment, and who will on a daily basis preside over the entire system of public prosecutions. Normally, the Attorney General should not be involved at all in the making of prosecutorial decisions. In the event, however, that extraordinary considerations affecting the public interest induce the Attorney General to assume his ultimate authority, the governing statute will require the Attorney General to commit his directions to writing and then ensure that these instructions are promptly tabled both in the legislature and in the most publicly accessible source of information as to the activities of the government, such as the *Royal Gazette*. Parallel with this recommendation is the need to publish for general consumption the Attorney General's guidelines that spell out the policies and considerations governing prosecutorial discretion. An encouraging beginning in this direction, in some parts of Canada, has already taken place. It is hoped that more will follow as the philosophy of greater openness gains wider recognition. The statutory procedures outlined in the concluding parts of this study will ensure that there is the fullest measure of public accountability, the proper insulation of the Director of Public Prosecutions from potentially damaging political interference, and at the same time the safeguarding of the Attorney General's ultimate powers of direction consonant with his constitutional responsibilities for the administration of justice.

Peer Review Workshop

A draft of the research on "The Role of the Office of the Attorney General" was vetted by a group of academics, lawyers and other interested persons. A workshop to discuss the research was held on September 29, 1988. The following is a list of participants at that workshop.

Researcher

Professor Emeritus John Ll. J. Edwards, Faculty of Law and Centre of Criminology, University of Toronto

Reviewers

1. *Gordon Gregory, Q.C.*, former Deputy Attorney General, New Brunswick
2. *Professor Roland Penner, Q.C.*, Faculty of Law, University of Manitoba; former Attorney General, Manitoba
3. *Marc Rosenberg*, Barrister, Greenspan and Rosenberg, Toronto

Invited Participants

1. *James Bissell, Q.C.*, Director, Atlantic Region, Justice Canada, Counsel to the RCMP
2. *Stanley Cohen*, Coordinator, Criminal Procedure Project, Law Reform Commission of Canada, Ottawa
3. *R. Gerald Conrad, Q.C.*, Executive Director (Legal Services), Department of Attorney General, Province of Nova Scotia
4. *Nadine Cooper-Mont*, Deputy Solicitor General, Province of Nova Scotia
5. *Anne Derrick*, Counsel to Donald Marshall, Jr.
6. *Chief Superintendent Don Docker*, Corporate Planning Branch, RCMP Headquarters, Ottawa
7. *Gordon Gale, Q.C.*, Director (Criminal), Department of Attorney General, Province of Nova Scotia
8. *Martin Herschorn, Q.C.*, Director (Prosecutions), Department of Attorney General, Province of Nova Scotia
9. *Doug Hunt*, Assistant Deputy Minister (Criminal), Ministry of the Attorney General, Ontario
10. *Chief Superintendent Leahy*, C.O. 'H' Division, RCMP, Halifax
11. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
12. *Christine Mosher*, Department of the Solicitor General, Province of Nova Scotia
13. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
14. *Al Pringle*, Justice Canada; Counsel to the RCMP
15. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
16. *Kit Waters*, Director of Policy and Planning, Department of the Solicitor General, Province of Nova Scotia

Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia

(Volume 6 of this Report)

Researcher

Professor Bruce P. Archibald, Faculty of Law, Dalhousie University, Halifax

Robert Bayne, Dalhousie Law School, Research Assistant

Judy MacDonald, Dalhousie Law School, Research Assistant

Executive Summary

This study examines the structure and administration of Nova Scotia's prosecution service, and the manner in which prosecutorial discretion is exercised within the province. In essence it examines one division of the province's "public law firm" and after identifying its weaknesses proposes methods by which it might be improved.

Looking first to organizational structure, regional offices are proposed to coordinate decision-making in the field and to create an effective middle level of management. With the head office thus freed from day-to-day involvement in routine cases, the study proposes appointment of a Director of Criminal Justice Policy Development to assist those with direct operational responsibilities in the elaboration of longer term policies and reforms. A specialized senior prosecutions unit is recommended for handling complex or lengthy cases which might disrupt personnel assignments in regular units, and also for training personnel. Improvements in the efficiency of the prosecution service through modernized research facilities, adequate administrative support, comprehensive continuing education and personnel evaluation are recommended. Finally, the maintenance of a highly trained staff through payment of competitive salaries and advancement through an appropriate career path is recognized as a high priority need.

The exercise of prosecutorial discretion is analyzed through a series of legal and policy issues, which are all linked by a concern to assure openness, accountability and freedom from partisan political interference in the administration of criminal justice. Three sets of recommendations, however, deal with these broad issues, and are linked to the administrative structure of the prosecution service. The first is a recommendation that the general instructions or guidelines by which Crown prosecutors govern their conduct be published and made available to accused persons, legal professionals and the public at large. The second is that the process by which prosecuting officers are engaged be structured so that merit is, and is seen to be, the primary criterion in hiring prosecutors. The third is the creation of the office of Director of Public Prosecutions (DPP). The DPP should be appointed for a fixed term, have responsibility for the daily management of the prosecution service and, in the event of disagreement, be subject to the Attorney General's direction in particular cases only through written and, ultimately, public instructions. It is recommended that in such a system the Attorney General retain responsibility for general criminal justice policy development and the promulgation of general guidelines or instruction for the operation of the prosecution service. In other words, the DPP would have operational independence while ultimate control and political accountability to the legislature would rest with the Attorney General.

A number of specific issues (identified through empirical research) are addressed concerning problems in the manner in which prosecutorial discretion is

exercised in the province. Clarification of the police duty to investigate offences and the public right to lay charges free from interference by Crown prosecutors is highlighted. The Crown's right to terminate any proceedings in the public interest is discussed, and there is proposed a clearly articulated list of factors which can and cannot be taken into account when terminating prosecutions in the public interest, even in the face of evidence which could sustain a conviction. Both issues of police independence and public interest factors in prosecutions are intended to assure public confidence in the non-partisan fairness of the criminal justice system.

Recommendations are made which relate to the procedural fairness of the criminal trial process. Improvements in the guidelines for disclosure of the Crown's case to the defence are put forward. Similarly, recommendations are made concerning police disclosure to Crowns as a precondition of Crown disclosure to defence. The regularization of plea discussions is advocated, by means of the adoption of enforceable rules, to ensure that guilty pleas flowing from such discussions are obtained in an open, voluntary, accurate and fair manner. These proposals on plea negotiation make special reference to the situation of the unrepresented accused. Important technical recommendations are made concerning pre-trial conferences, use of summaries to trial judges and use of preliminary transcripts in non-jury trials. Finally, guidelines are proposed concerning the propriety of informal contact between Crown counsel and judges.

While this study did not make a wide ranging examination of problems faced by visible minorities caught up with the criminal justice system, it does propose that the Attorney General develop diversion programs and sentencing alternatives in consultation with visible minority communities. It also proposes that Crown prosecutors receive special training about the nature of adverse effects of discrimination in the criminal justice system, and the manner in which they may carry out their duties so as to assist in reducing such discrimination.

Peer Review Workshop

An early draft of the research on "Prosecuting Officers and the Administration of Justice in Nova Scotia" was vetted by a group of lawyers and other interested persons. A workshop to discuss the research was held on June 23, 1988. This discussion was considered in later drafts of the research. The following is a list of the participants at that workshop.

Researcher

Professor Bruce P. Archibald, Faculty of Law, Dalhousie University, Halifax, Nova Scotia

Reviewers

1. *Ken Chasse*, Director of Research, Ontario Legal Aid Plan, Toronto
2. *Gordon Gregory, Q.C.*, former Deputy Attorney General, Province of New Brunswick
3. *Marc Rosenberg*, Barrister, Greenspan and Rosenberg, Toronto

Invited Participants

1. *James Bissell, Q.C.*, Director, Atlantic Region, Justice Canada, Counsel to the RCMP
2. *Lorenne Clark*, Barrister and Solicitor, Digby

3. *Stanley Cohen*, Coordinator, Criminal Procedure Project, Law Reform Commission of Canada
4. *Professor Brent Cotter*, Associate Dean, Faculty of Law, Dalhousie University
5. *Anne Derrick*, Counsel to Donald Marshall, Jr.
6. *William Digby, Q.C.*, Director, Nova Scotia Legal Aid
7. *Pat Duncan*, Barrister and Solicitor, Halifax
8. *Martin Herschorn, Q.C.*, Director (Prosecutions), Department of Attorney General, Province of Nova Scotia
9. *Professor Archie Kaiser*, Faculty of Law, Dalhousie University
10. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
11. *Robert Parker*, Crown Prosecutor, Nova Scotia
12. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
13. *Adrian Reid*, Crown Prosecutor, Province of Nova Scotia
14. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
15. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
16. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

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List of participants at the Consultative Conference
Halifax, November 24-26, 1988

Professor Bruce Archibald - Dalhousie Law School, Halifax; author of Commission research study entitled "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia" (published as Volume 6 of this Report)

Bromley Armstrong - Labour Relations Board of Ontario, Toronto (Speaker)

Stephen Aronson - Barrister and Solicitor, Ottawa

Susan Ashley - Commission Executive Secretary, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

Yvonne Atwell - Black United Front, Halifax

Davies Bagambiire - Barrister and Solicitor, Halifax

Russel Barsh - Lawyer, Washington, D. C. (Speaker)

Marie Battiste - Grand Council of Micmacs, Eskasoni, Nova Scotia

Thomas Berger - Barrister and Solicitor, Vancouver (Chair of Consultative Conference)

Sherry Bernard - Black United Front, Halifax

James Bissell, Q.C. - Director, Atlantic Region, Justice Canada, Halifax

Honourable Alan Blakeney, P.C., Q.C. - Barrister and Solicitor,Toronto; former Premier of Saskatchewan

John Briggs - Director of Research, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

David J. Bright - Chair, Criminal Law Subsection, Canadian Bar Association, Nova Scotia Branch, Halifax

Fred Caron - Senior Counsel, Office of Aboriginal and Constitutional Affairs, Justice Canada, Ottawa

Linda Carvery - President, Congress of Black Women, Halifax

Professor Innis Christie - Dean, Dalhousie Law School, Halifax

Alex Christmas - President, Union of Nova Scotia Indians, Sydney

Kevin Christmas - Union of Nova Scotia Indians, Sydney

Professor Don Clairmont - Dalhousie University, Halifax; consultant to the Commission and co-author of Commission research study entitled "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" (published as Volume 4 of this Report)

Gerald Clarke - Executive Director, Black Educators Association of Nova Scotia, Halifax

Stan Cohen - Coordinator, Criminal Procedure Project, Law Reform Commission of Canada, Ottawa

Nadine Cooper-Mont - Deputy Solicitor General of Nova Scotia, Halifax

Thelma Costello - Executive Director, Public Legal Education Society of Nova Scotia, Halifax

Professor Brent Cotter - Director, Dalhousie Legal Aid, Halifax

Judge Jean-Charles Coutu - Provincial Court of Quebec, Coordinating Judge for the Itinerant Court of the District of Abitibi, Rouyn-Noranda (Speaker)

Ian B. Cowie - Consultant, Ottawa

Chester Cunningham - Executive Director, Native Counselling Services of Alberta, Edmonton (Speaker)

Robert Depew - Department of Indian Affairs and Northern Development, Self-Government Negotiations Branch, Ottawa

Anne Derrick - Barrister and Solicitor, Halifax

Frank Edwards - Crown Prosecutor, Sydney

Professor John Edwards - Faculty of Law, University of Toronto, Special Advisor to the Commission and author of a series of Opinion Papers for the Royal Commission entitled "Walking the Tightrope of Justice: An Examination of the Office of Attorney General" (published as Volume 5 of this Report) (Speaker)

Honourable Gregory T. Evans, Q.C. - Commissioner, Royal Commission on the Donald Marshall, Jr., Prosecution, Toronto

Dana Giovannetti - Barrister and Solicitor, Department of Attorney General of Nova Scotia, Halifax

Chief Roderick Googoo - Vice-President (Cape Breton), Union of Nova Scotia Indians, Whycocomach, Nova Scotia

Associate Chief Justice Alvin Hamilton - Commissioner, Aboriginal Justice Inquiry, Winnipeg

Dr. Wilson Head - Federation of Race Relations Organizations, Toronto; co-author of Commission's research paper entitled "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" (published as Volume 4 of this Report)

Sakej Henderson - Grand Council of Micmacs, Eskasoni, Nova Scotia

Chief Justice T. Alexander Hickman - Chairman, Royal Commission on the Donald Marshall, Jr., Prosecution, St. John's

John Hylton - Social Development Office, City of Regina

Professor Michael Jackson - University of British Columbia Law School, Vancouver (Speaker)

Dr. P. Anthony Johnstone - Executive Director, Nova Scotia Human Rights Commission, Halifax

Burnley (Rocky) Jones - Halifax (Speaker)

Professor Archie Kaiser - Dalhousie Law School, Halifax

Stephen Kimber - Halifax

Serge Kujawa, Q.C. - General Counsel (Criminal), Department of Justice, Province of Saskatchewan, Regina (Speaker)

Dr. Carol LaPrairie - Senior Policy Analyst, Justice Canada, Ottawa

George W. MacDonald, Q.C. - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

William MacDonald, Q.C. - Deputy Attorney General of Nova Scotia, Halifax

Professor Wayne MacKay - Dalhousie Law School, Halifax

Reg Maloney - Vice-President (Mainland), Union of Nova Scotia Indians, Hants County

Morris Manning, Q.C. - Barrister and Solicitor, Toronto (Speaker)

Howard McCurdy, M.P. - for Windsor-Walkerville, Ontario

Dan McIntyre - Executive Coordinator, Race Relations Directorate, Ministry of Citizenship, Province of Ontario, Toronto (Speaker)

Carol Montagnes - Director, Policy and Program Development, Ontario Native Council on Justice, Toronto

John Moore, Q.C. - President, Nova Scotia Barristers Society, Halifax

Professor Brad Morse - University of Ottawa Law School; Director of Research, Aboriginal Justice Inquiry, Winnipeg

Barbara Murphy - Legal Services Society of British Columbia, Vancouver

Graydon Nicholas - President, Union of New Brunswick Indians, Fredericton

Chief Joe Norton - Grand Chief of the Mohawks, Kahnawake, Quebec (Speaker)

David B. Orsborn - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, St. John's

Dr. Bridglal Pachai - Executive Director, Black Cultural Centre, Dartmouth

Daniel N. Paul - Executive Director, Confederacy of Mainland Micmacs, Shubenacadie

Chief Lawrence Paul - Confederacy of Mainland Micmacs, Shubenacadie

Lloyd Perry, Q. C. - Barrister and Solicitor, Toronto

Darrel I. Pink - Barrister and Solicitor, Halifax

Associate Chief Justice Lawrence A. Poitras - Commissioner, Royal Commission on the Donald Marshall, Jr., Prosecution, Montreal

Al Pringle - Barrister and Solicitor, Justice Canada, Halifax

Professor Don Purich - Director, Native Law Centre, University of Saskatchewan Law School, Regina

Professor Edward Renner - Department of Psychology, Dalhousie University, Halifax

Joyce Robart - Black United Front, Association of Black Social Workers, Halifax

Viola Robinson - President, Native Council of Nova Scotia, Truro

Marc Rosenberg - Barrister and Solicitor, Consultant to Law Reform Commission of Canada, Toronto

Anthony Ross - Barrister and Solicitor, Dartmouth

Tom Sampson - Chair, First Nations of South Island Tribal Council, Mill Bay, British Columbia

Jamie W. S. Saunders - Barrister and Solicitor, Halifax

Chief Judge Murray Sinclair - Commissioner, Aboriginal Justice Inquiry, Winnipeg

Professor Brian Slattery - Osgoode Hall Law School, York University, Toronto

Amos Smalling - National Black Coalition, Vancouver

Rita Smith - Confederacy of Mainland Micmacs, Shubenacadie

W. Wylie Spicer - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

Professor Philip Stenning - Centre of Criminology, University of Toronto; consultant to the Commission and co-author of Commission research paper entitled "Public Policing in Nova Scotia" (published as Volume 2 of this Report)

Professor Samuel Stevens - University of British Columbia Law School, Vancouver (Speaker)

Carolyn Thomas - Moderator, African United Baptist Federation, Halifax

Esmeralda Thornhill - Director of Education, Quebec Human Rights Commission, Montreal (Speaker)

R. H. Vogel, Q.C. - Barrister and Solicitor, Vancouver (Speaker)

Florence Walsh - Native Council of Nova Scotia, Truro

H.A.J. (Gus) Wedderburn - Barrister and Solicitor, Halifax

Juanita Westmoreland-Traore - President, Quebec Cultural Communities and Immigration Council, Montreal

Professor Bruce Wildsmith - Barrister and Solicitor, Dalhousie Law School, Halifax

Castor Williams - Barrister and Solicitor, Halifax

Dolly Williams - Congress of Black Women, Halifax

Roy Williams - Metropolitan Toronto Police Commission, Toronto

Max Yalden - Chief Commissioner, Canadian Human Rights Commission, Ottawa

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Opinion

prepared by Professor Bruce P. Archibald, Faculty of Law, Dalhousie University

The Use of Evidence and the Making of Evidentiary Rulings at the Trial of Donald Marshall, Jr.

(This Opinion was entered as Exhibit 83 in the Public Hearings of the Royal Commission)

Introduction

The purpose of this opinion is to assess the use of evidence and the making of evidentiary rulings at the trial of Donald Marshall, Jr. It is undertaken in response to the request made by George W. MacDonald, Counsel to the Royal Commission on the Donald Marshall, Jr., Prosecution, that I review the transcript of the trial in order to comment on the various rulings on evidentiary points and also on objections which might have been made but were not. I have also made certain recommendations for reform which flow from my analysis of what transpired during the Marshall trial.

The method utilized here has been to examine the transcript to assess the actions of counsel for the Crown and for the defence, as well as those of the presiding judge in the light of evidentiary law and criminal trial procedure as applicable in November of 1971 (although sources published after 1971 will be referred to where they nevertheless reflect the law at that time). In doing so, an attempt has been made to assess the situation from the point of view of the participants at that time with the knowledge of the facts surrounding the death of Sandy Seale and of the applicable law which they had or *ought reasonably* to have had in the circumstances. While a review in 1987 has the benefit of hindsight, the participants involved in the trial cannot be assessed as if they had or even ought to have had knowledge of all of the facts which have become a matter of general public knowledge and which led to the conviction of another man in relation to the crime with which Donald Marshall, Jr. was charged and found guilty in 1971. In particular this opinion will concentrate on matters which were not raised in Mr. Marshall's appeal to the Nova Scotia Supreme Court, Appeal Division. (See *Regina* v. *Marshall* (1972), 8 C.C.C.(2d) 329)

The most crucial parts of this opinion present an overview of certain problematic evidentiary issues raised at the trial of Donald Marshall, Jr., and analyze in some detail the examination and cross-examination of the witness John Pratico. However, the analysis of these specific issues at the Marshall trial are preceded by a presentation of the nature and purpose of evidentiary law in a criminal trial in order to set the specific issues in a meaningful context. Thus, this opinion is divided into four parts entitled, respectively: (i) General Principles of the Law of Evidence; (ii) An Overview of Problematic Evidentiary Issues at the Trial; (iii) Hearsay, Out of Court Statements and Impeaching Witnesses: the Evidence of John Pratico; and (iv) General Conclusions.

I General principles of the law of evidence

The rules of evidence applied in Canadian criminal trials are designed to give effect to a process of dispute resolution which is adversarial in nature. Conduct of the trial is primarily in the hands of counsel for Crown and defence while judge and jury take a relatively passive role. A classic Canadian description of this method of inquiry is given by Evans, J. A. in *Phillips* v. *Ford Motor Company* (1971), 18 D.L.R.(3d) 641 (Ont. C.A.) at p. 661:

> *Our mode of trial procedure is based on the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value*

> *in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matter in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of research director; it is a forum established for the purpose of providing justice for the litigants. Undoubtedly a Court must be concerned with truth, in the sense that it accepts as true certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark upon a quest for the "scientific" or "technological" truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law.*

It is recognized, however, that a trial judge may have a special duty in certain circumstances in a criminal trial to safeguard the liberty of the subject by taking a more active role which, in extreme cases, might even include the judge calling witnesses. (See *Regina* v. *Cleghorn*, [1967] 1 All E.R. 996; *Regina* v. *Brown* (1967), 3 C.C.C. 210 (Que. Q.B. App. Side) and *Regina* v. *Bouchard* (1973), 12 C.C.C.(2d) 554 (N.S. Co. Ct.))

The law of evidence consists of a large and sometimes confusing body of rules which regulate the adversarial trial process and balance a number of competing interests in this process, including: (a) the ascertainment of the true facts at issue; (b) assuring fairness as between Crown and defence in the presentation of evidence; (c) assuring public confidence in the fairness and impartiality of a criminal trial; and (d) the elimination of unjustifiable expense and delay. (See E. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation*, 1956, *The King* v. *Barbour*, [1938] S.C.R. 465, and S. A. Schiff, *Evidence in the Litigation Process*, Carswell, Toronto, 1983, Vol. 1, p. 11.)

The first principle of the law of evidence is that of *relevance*. *Only* relevant evidence is admissible at trial, and *all* relevant evidence is admissible unless excluded by some particular rule of evidence. (See James Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 1898, pp. 264-266, and *Morris* v. *R.* (1984), 7 C.C.C.(3d) 97 (S.C.C.)) Evidence is relevant where it tends to prove a fact in issue, that is, where the presentation of the evidence tends to show that a fact which must be proved existed, or at least that such an inference is more likely given the evidence tendered than without it. This is a matter of both logic and experience. (See R. J. Deslisle, *Evidence: Principles and Problems*, Carswell, Toronto, 1984, pp. 4-6.)

A clear distinction must be made, however, between the *relevance* of evidence and its *weight*. The threshold test of relevance for the admissibility of evidence is not a difficult one to meet. Evidence may be relevant to an issue and therefore admissible, but far from conclusive on that issue, particularly in light of the requirement in criminal cases that the guilt of the accused be proved beyond a reasonable doubt. Thus, evidence that the gun which killed the victim belonged to the accused will be relevant to proving the accused's guilt, but it might have little weight in the absence of other relevant evidence of the accused's motive or opportunity to commit the crime or in the face of clear evidence of an alibi. To use the metaphor employed by one commentator, it takes many bricks to make a wall. If the "wall" is proof of guilt beyond a reasonable doubt, the required quantity of "relevant bricks" will depend upon their size, shape and weight.

While relevance to a fact in issue may be the first principle of the law of evidence, it is equally true that the vast bulk of evidentiary law consists of a body of "exclusionary rules" which prevent the admission in the proceeding of relevant evidence for a variety of reasons of policy. For example, "hearsay" evidence is excluded for a number of reasons: out of court statements may be unreliable since they are not given under oath, and their admission may be unfair to the opposing party who will be unable to cross-examine the declarant concerning such facts as his or her bias, opportunity for observation, ability to remember, or capacity to accurately describe the events perceived. A witness' statement that "X *said* he saw the accused commit the offence" may therefore be highly relevant, but the hearsay rule has been developed by the courts to exclude such testimony out of concerns about reliability and fairness. (See E. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept", (1948) 62 Harv. L. Rev. 177)

The general approach of the law of evidence, then, is that relevant evidence is admissible unless excluded by a particular rule. A judge is not free to exclude evidence on the basis of his or her personal views but must apply pre-existing standards or principles. However, it is widely accepted that a Canadian judge in a criminal trial has the authority to exclude relevant evidence in the absence of a *particular* exclusionary rule where there is "evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling". (*The Queen* v. *Wray*, [1971] S.C.R. 272 at 293) (Of course, since the advent of the Charter of Rights and Freedoms in 1982, courts may exclude evidence obtained by a Charter breach in accordance with the broader and more flexible standard of whether "having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute." - Charter, Section 24(2))

One of the most confusing aspects of the application of the law of evidence in practice is the principle that evidence which is inadmissible for a particular purpose according to one rule may be admissible for a different purpose by means of another rule. For example, in a negligence action arising out of any automobile accident, the hearsay rule would prevent the defendant from testifying that a mechanic told him his brakes were in good order when the purpose is to refute the plaintiff's allegation that faulty brakes had *caused* the accident. The court would want evidence directly from the mechanic on this issue. On the other hand, such a statement from the defendant about what the mechanic said would be admissible on the issue of whether the defendant had acted negligently in failing to have his brakes tested further. In the second instance, the hearsay rule would not apply to exclude the testimony. Proper procedure in such cases of "conflicting " rules is usually for the judge to admit the evidence, that is let the question be answered, but to instruct the jurors that they are limited in the use which they can make of such answers. In the example given, the jury would be told that the defendant's testimony on the mechanics' statement could be used in determining whether the defendant was negligent but not in determining the cause of the accident. (See S. A. Schiff, *Evidence in the Litigation Process*, Carswell, Toronto, 1983, Vol. I, p. 73) (This type of occurrence in fact happened in the Marshall trial when Maynard Chant was declared to be an adverse witness. He had made a prior statement inconsistent with the testimony he gave at trial. The presiding judge, in accordance with established practice, told the jury that they could not accept the prior statement as evidence but could take into account the fact that he made it in determining whether to believe his statements on the witness stand in the trial.) Needless to say, there is some skepticism about the effectiveness of such limiting instructions, but the technique is widely used and thought to be a practical necessity.

The final general comments on the law of evidence relate to the manner in which evidentiary rules are invoked, applied and enforced, both at a trial and through the mechanism of appeal. Trial judges presiding in an adversarial setting are rightly loath to interfere with the conduct of the case by counsel. Thus, where competent opposing counsel does not object, a judge may allow relevant testimony to continue, where the evidence might be technically inadmissible, in order not to interrupt the flow of otherwise proper testimony. This, of course, is a matter of judgment because a judge in a criminal trial, even in the absence of objection from opposing counsel, must not admit in evidence testimony which would result in an *unjust* trial. (*Colpitts* v. *The Queen*, [1965] S.C.R. 739) In the event of a dispute over whether a judge has exercised proper judgment in this regard, the only remedy is to take the matter on appeal. However, the law on criminal appeals is such that a mere finding of a trivial or technical misapplication of the law of evidence will not result in a new trial or a reversal of the original verdict. *Criminal Code* Section 613(1)(b)(iii) [now 686(1)(b)(iii)] provides that an appeal may be dismissed even where there has been a wrong decision on a matter of law when the appeal court "is of the opinion that no substantial wrong or miscarriage of justice has occurred". Thus, the strict application of the rules of evidence is tempered by a practical appreciation of the particular circumstances of each trial and the interplay among counsel and presiding judge in relation to them. Given the complexity of the law of evidence, such a flexible approach is essential; otherwise almost every criminal verdict might be overturned for trivial reasons.

II An overview of problematic evidentiary issues at the trial of Donald Marshall, Jr.

In conducting an overview of the problematic evidentiary issues at the trial two general areas are revealed as worthy of analysis: (i) a series of witness statements which were of tangential relevance, questionable weight and potential prejudice; and (ii) the approach to the hearsay rule taken by the presiding judge and counsel for Crown and defence in relation to testimony from several witnesses.

1. Problems with relevance, weight and prejudice

As mentioned above, the determination of whether any particular statement or evidence tendered is "relevant" is a matter of judgment which must be exercised in the light of logic and practical experience. However, the test of relevance is whether the evidence offered tends to prove a *fact in issue* - that is, an element of the offence charged or an aspect of a pertinent defence. Evidence may be classified as *direct*, that is where a witness testifies to have perceived a matter which must be proved, or *circumstantial* where the witness testified to having observed something from which it may be *inferred* that a fact in issue existed. Many criminal cases are properly proved by the use of circumstantial evidence only. However, judgments as to what evidence is relevant and what evidence is irrelevant in such cases can be difficult, since the relevance of any particular item or observation may not be clear except when viewed in relation to all the rest of the evidence which "gives the total picture" or ties the individual elements of proof together. Evidence may be clearly irrelevant in which case it is inadmissible. On the other hand, it may be of some relevance, and a presiding judge may admit it on the assumption that counsel will "tie it in" before the conclusion of the case. Thus, evidence in a criminal trial may consist of both highly relevant and tangentially relevant bits of information. This highlights the importance of the role of the trial judge's charge to the jury in which he or she has the duty to help the jury separate the evidentiary wheat from the chaff.

It may be thought that problems of relevance and attendant potential prejudice flow from aspects of the testimony given at the Marshall trial by witnesses Merle Faye Davis, Oscar and Leotha Seale, Patricia Harriss and Terrance Gushue. Each of these will be dealt with in turn.

A. The evidence of Mrs. Davis

Mrs. Merle Faye Davis was called by the Crown and examined in chief by Mr. MacNeil. Her evidence was to the effect that she had, in her duties as a nurse at the City of Sydney Hospital, treated the accused for a laceration on his left forearm on the night of the death of Sandy Seale, and she testified that the accused had been wearing a yellow jacket. It is apparent from a reading of the transcript that the Crown believed that evidence concerning the laceration would be relevant to an anticipated defence of self-defence (which was not ultimately put forward by the accused in the manner anticipated by the Crown), and that the evidence of the accused wearing a yellow jacket was relevant when taken together with that of purported eyewitnesses to the stabbing who "saw" Seale's assailant wearing a yellow jacket. This was the core of Mrs. Davis' testimony and presented no problems of relevance.

In passing, however, there occurred the following interchange during the examination-in-chief of Mrs. Davis:

Q. *Did you notice anything else about his arm?*
A. *I noticed a tattoo on his arm.*

Q. *Can you tell us what that tattoo is?*
A. *"I hate cops."*

This evidence is not directly relevant to the proof of any element of the offence, or to the proof of any defence. It is relevant to prove the character of the accused and his disposition toward the police, and only indirectly, if at all, to show that he is the kind of person capable of committing crimes. Since the accused had not put his character in issue at this point in the trial, the admission of such evidence was improper. (*R.* v. *Rowton* (1985), 10 Cox C.C. 25 at p. 38 (per Willes, J.)) Crown counsel should not have asked a question designed to elicit this testimony, defence counsel could have objected to it, and the trial judge might have prevented a reply or directed the jury to disregard it. (See *Stirland* v. *DPP*, [1944] A.C. 315 (H.L.)) However, the incident may not be serious enough to warrant the declaration of a mistrial. (See *R.* v. *Ambrose* (1976), 25 C.C.C.(2d) 90 (N.B.C.A.)) On appeal, the giving of this evidence might be thought insufficient, in and of itself, to overturn a verdict of guilty as not being a "substantial wrong or miscarriage of justice" in the language of Section 613 [now 686] of the *Criminal Code* in 1971. As such, one can understand what appears to have been the response of the court and defence counsel, if indeed they turned their minds to the issue: that is, to ignore the "tattoo" matter on the assumption that to draw attention to it would heighten its prejudicial impact on the jury. However, it is impossible to assess, in retrospect, what the effect of the wrongful admission of this evidence might have had in a trial where the outcome depended upon assessing the credibility of witnesses for the Crown and of the accused, where two totally conflicted versions of the events in question were being advanced by each side.

B. The evidence of Mr. and Mrs. Seale

The Crown called Mr. and Mrs. Seale, the parents of the victim, in order "to prove the continuity of the exhibits" in the form of a brown jacket and overalls which had been worn by the victim on the evening in question. While it was the practice in criminal trials in 1971 to present formal proof of the continuity of possession of all exhibits in order to demonstrate the absence of falsification or error in relation to them, the exhibits must be shown to be relevant in the first place to be admissible at all. The rationale for the relevance of these items to the Crown's case was not demonstrated at the time they were admitted in evidence, and the fact that they were virtually ignored in the subsequent parts of the proceeding confirms the difficulty concerning their lack of relevance. Comments from Crown counsel, Mr. MacNeil, during his summation (Trial Transcript, Page 233) to the effect that continuity must be demonstrated and that requirements of proof may differ where the accused testifies, side-step the issue of the relevance of these exhibits.

While the argument in favour of the admissibility of these items was never made, their admissibility was not challenged by defence counsel or adversely commented upon by the presiding judge. All participants seemed to assume that their relevance would or could be demonstrated, though this did not turn out to be the case in the final analysis.

Though the relevance of the exhibits referred to by Mr. and Mrs. Seale was never demonstrated, they both appeared on the witness stand and may have become the objects of considerable sympathy on the part of jurors. Their son had been the victim of a gruesome murder, and the transcript seems to indicate that they were being treated with solicitude by both Crown and defence counsel. However, the ultimate irrelevance of their testimony and the impropriety of allowing sympathy for their plight to influence the decision in the case were not made the subject of comment by the trial judge in his charge to the jury. It is doubtful, however, that there is an appealable error of law in this matter, and even more doubtful that there is one which alone would pass the "no substantial wrong or miscarriage of justice" test. While this issue might have been better handled in a charge to the jury, it is a matter of speculation as to whether by itself or in combination with other evidence adverse to the accused, it contributed to Mr. Marshall's wrongful conviction.

C. The evidence of Miss Harriss and Mr. Gushue

It was the evidence of Patricia Harriss and Terry Gushue that they had encountered the accused, Mr. Marshall, in the company of one other person (although there was doubt about whether others might have been present) in the vicinity of the stabbing some little time prior to the event. Their evidence was clearly relevant to proof of the material elements of the offence in that they identified the accused and put him at the scene of the crime. Their testimony was also relevant to the extent that their inability to specifically recall others at the scene tended to rebut any defence of denial which would put the blame on others. While this was not direct testimony of the "eyewitness" variety, and while it was far from conclusive circumstantial evidence, it was certainly relevant and therefore admissible evidence.

With present knowledge of Mr. Marshall's wrongful conviction, it might be tempting to characterize this evidence as having been improperly admitted. In the language of *The Queen* v. *Wray*, was this evidence "gravely prejudicial to the accused", was its admissibility "tenuous", was its "probative force" in relation to the main issue before the Court "trifling"? The answer to these questions must be "no". The evidence of Harriss and Gushue was not gravely prejudicial; it was rather one more brick in a wall which the Crown was trying to construct. Its relevance and therefore admissibility in the absence of an exclusionary rule was evident and direct. Its probative force or weight, while not conclusive, was certainly more than trifling. This later judgment would have appeared, at the time of the trial, to have been confirmed by Mr. Marshall's inability in cross-examination to explain how his version of the events could have co-existed with the circumstances described by Miss Harriss and Mr. Gushue. While in retrospect it may be clear that the inferences which the Crown wished the jury to draw from the evidence of Miss Harriss and Mr. Gushue were incorrect, it is equally clear that there were no "evidentiary errors" in the manner in which their testimony was elicited.

2. The general approach to hearsay at the trial

In its attempt to restate the law of evidence in a statutory framework, the Federal/Provincial Task Force on Uniform Rules of Evidence (*Report*, Carswell, Toronto, 1982, p. 124) defines hearsay in the following manner:

> *'Hearsay' means a statement by a person other than one made while testifying as a witness at the proceeding*, that is offered in evidence to prove the truth of the matter asserted. (emphasis added)

The Task Force also recommended unanimously that in the foregoing definition, "statement" should mean "an oral or written assertion" and that it should include "non-verbal conduct intended as an assertion". The Task Force recognized that defining hearsay has been a matter of some controversy, but for the purpose of this opinion subtle differences among competing definitions are not determinative of issues raised in the Marshall trial. The above definition contains the commonly accepted core of the notion of hearsay, and corresponds to a definition referred to by the judge in the Marshall trial from the Eleventh Edition of *Phipson on Evidence* at p. 268:

> *Former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.*

The policy behind the rule which normally excludes hearsay evidence from criminal trials was referred to in Part I of this opinion. However, as all practitioners of law are aware, the general rule excluding hearsay testimony is subject to numerous exceptions which operate to allow in evidence what would otherwise be excluded by a blanket application of the rule. Many exceptions have developed in accordance with a "necessity" principle, while others have emerged as courts have become convinced that in the particular fact patterns there are circumstances which guarantee the trustworthiness of these statements notwithstanding the so-called "hearsay dangers" discussed earlier. (See R. J. Delisle, *Evidence: Principles and Problems*, Carswell, Toronto, 1984, pp. 219-221) The result of this accretion of common law precedent has been the development of a highly complex, even arcane body of evidentiary law. As one famous judge put it: "It is difficult to make any general statement about the law of hearsay which is entirely accurate." (Per Lord Reid, *Myers* v. *D.P.P.*, [1965] A.C. 1001 (H.L.) at p. 1070) Counsel and the presiding judge at the Marshall trial encountered difficulty with the hearsay rule and its exceptions during the testimony of Sgt. Michael MacDonald, Maynard Chant, M. D. Mattson and John Pratico. The first three witnesses and hearsay issues will be dealt with in this Section as a group. The problems with "hearsay" in Mr. Pratico's testimony are sufficiently important to be addressed separately in Part III of this opinion.

A. Sergeant MacDonald's hospital conversations with Maynard Chant

Sgt. Michael MacDonald was called by the Crown and questioned briefly by Mr. MacNeil concerning the proof of "continuity of exhibits" as discussed earlier. Controversy concerning the applicability of the hearsay rule arose during Mr. Rosenblum's cross-examination of Sgt. MacDonald. The process of cross-examination had elicited the facts that Sgt. MacDonald had encountered Maynard Chant for a few minutes at the City of Sydney Hospital in the early morning hours following the stabbing. The exchange which sparked the controversy began as follows:

Q. *...when you say Mr. Chant and you had a brief conversation, was Donald Marshall present?*
A. *No sir. He was in the building.*
Q. *Did Chant tell you anything -*

At this point Mr. MacNeil objected on the grounds that conversation which took place "between the officer and Mr. Chant is inadmissible unless the accused is present". Somewhat later in argument in the absence of the jury Mr. MacNeil rephrased his objection in the following manner: "...I know of no rule that would allow a conversation to go in that may work to the detriment of the accused when he wasn't present." Mr. Rosenblum for the defence, apparently inhibited by the potential application of the hearsay rule, attempted to avoid its invocation with the following argument:

...I'm not asking for the words that were used, my Lord. I'm asking the question as to whether or not Chant made any accusation to this witness concerning Donald Marshall, at any time -

Later in argument the trial judge correctly says: "You're asking him about conversation which he had with Mr. Chant, and however you may phrase it, it gets to what Chant said to him." But in immediate reply to this statement from the judge, Mr. Rosenblum indicates indirectly the rationale behind his cross-examination when he stated: "Or didn't say - or didn't say! This is the point. Silence!"

One way to analyze the defence line of question is to say that Mr. Rosenblum was seeking to put in evidence statements, or at least implied assertions, from Mr. Chant as heard by Sgt. MacDonald, that Mr. Marshall did or did not stab Sandy Seale *for the purpose of their being taken into account by the jury as evidence of Mr. Marshall's guilt or innocence.* This interpretation may have been reinforced in the mind of the Court and counsel for the Crown by the nature of the form of restatement of the question made by Mr. Rosenblum in seeking an evidentiary ruling:

Q. *Did Maynard Chant on that occasion say anything to you to implicate Donald Marshall, Jr., the accused in this case, in connection with the injuries which had been sustained by the late Sandy Seale?*

This might be interpreted as seeking the admission of the statement for reasons contrary to the policy behind the hearsay rule as described above. But the other purpose for asking this question, which is alluded to by Mr. Rosenblum in his argument although not made entirely clear, is to determine *not the contents* of any accusation or lack thereof, but the mere fact that an accusation was or was not made. This purpose is not to elicit evidence which would go directly to the main issue of Mr. Marshall's guilt or innocence but rather to Maynard Chant's credibility as a witness. Chant did not implicate Mr. Marshall when he had an opportunity to do so, and as he ought to have done as an upstanding credible person. This would surely be the main point of the "silence" which Mr. Rosenblum apparently expected Sgt. MacDonald to describe. Moreover, it would be to use the out of court statement for a proper non-hearsay purpose, but one which would invite a limiting instruction in the judge's charge to the jury.

The trial judge refused to allow the question to be put to the witness. However, it is not entirely clear from the transcript whether he based his ruling on the principle that an answer would be inadmissible hearsay or because to allow cross-examination of one witness about statements made by another in order to impugn the latter's credibility would be improper. His ruling is perhaps based upon an amalgam of both sets of reasons. Given the revelations subsequent to the trial, it becomes important to know why Maynard Chant's credibility was not challenged. Mr. Rosenblum may not have understood at the time he made them the full significance of his repeated statements during the course of argument on this evidentiary issue that it was of "great importance to the case", the "nub of the case" and the "heart of the case".

In assessing Mr. MacNeil's objection to Mr. Rosenblum's question to Sgt. MacDonald from the viewpoint of hearsay analysis, a number of points must be made. Firstly, there is Mr. MacNeil's assertion that "conversation took place [sic] between the officer and Mr. Chant is inadmissible unless the accused is present". If this involves an assertion that testimony on all conversation outside the courtroom implicating an accused in the absence of the accused is inadmissible hearsay, then it is incorrect because it fails to take into account the purpose for which the statement may be adduced (i.e., challenge to credibility rather than for truth of contents). To the extent Mr. MacNeil viewed the presence of the accused as determinative, it appears to be an incorrect statement of law with two possible sources of origin. Prior to the 1955 revision of the *Criminal Code* the provision which established procedures at a preliminary inquiry was worded in part:

The evidence of the said witnesses shall be given upon oath and in the presence of the accused and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

Perhaps Mr. MacNeil believed this rule, found in Code Section 468 [now 540] in 1971, extended to statements made during police investigation. On the other hand, it may be that Mr. MacNeil was misconstruing an established exception to the hearsay rule which provides that where an accusation is made in the presence of an accused and is not denied, it can be treated as an admission against interest and admitted in evidence. Regardless of the mistaken origins of Mr. MacNeil's asserted rule, and even though the trial judge did not immediately accept it in the form in which it was asserted, Mr. MacNeil's insistence upon it may have had the effect of inhibiting enquiry into the manner in which the trial dealt with police investigation. Mr. Rosenblum seemed to be sensitive to this purported interpretation of the hearsay rule which proved so adverse to his client's interests. Furthermore, it may have influenced the decision made by the trial judge in ruling on this particular issue.

The trial judge was ambiguous about the basis on which he made the ruling that Mr. Rosenblum could not ask Sgt. MacDonald about his conversations with Maynard Chant. On the one hand, he quoted at length from *Phipson on Evidence*, Eleventh Edition (at p. 63 of the Trial Transcript) at the point in the text that deals with the hearsay rule. Significantly, he omitted to cite the passage which points out that one of the most frequent sources of error in hearsay analysis is to exclude out of court statements without reference to the *purpose* for which they are adduced. However, after citing Phipson on hearsay, he shifts discussion to a case, apparently cited by Mr. Rosenblum, called *Rex* v. *Rewniak*, [1949] 7 C.R. 127 (Man. Q.B.) which considered the issue of cross-examination of witnesses as to credibility of other witnesses and held that unnecessary restriction of cross-examination might, in a proper case, be grounds for appeal. Without further analysis the trial judge concluded:

> *While I repeat again that I appreciate very much the reasons for the submission, both the legal reasons and the practical reasons from the point of view of the defence, I have come to the conclusion that in this particular case, in the circumstances of this case, my ruling is that the witness cannot be questioned about the conversation which he had with Mr. Chant.*

A reading of *Rex* v. *Rewniak* and the annotation by A. E. Popple which follows it at [1949] 7 C.R. 136 should lead to the opposite conclusion. However, the judge then assured Mr. Rosenblum that the latter would be able to ask Maynard Chant directly about his conversations with Sgt. MacDonald (even though the accused was not present!). The ruling thus appears to have been mainly based on an application of the hearsay rule. However, it is clear that its main effect was to inhibit the defence in any effort to examine the manner of police questioning as a basis for challenging the credibility of one of the two key "eyewitnesses".

To assess the potential effect of this confused evidentiary ruling on the trial, it is important to examine what might have occurred if proper analysis had flowed along the lines of credibility and not hearsay. It is to be remembered that what was at stake here was the credibility of Maynard Chant as a Crown witness. Maynard Chant *had not yet testified* and Mr. Rosenblum, in his cross-examination of Sgt. MacDonald, was anticipating difficulties which he might have with Chant's testimony based, presumably, on what the latter had said at the preliminary inquiry. The propriety of Mr. Rosenblum's question must be assessed in the light of the recognized purposes of cross-examination. These purposes are described by Professor Stanley A. Schiff in his *Evidence in the Litigation Process* (2nd Ed.), Carswell, Toronto, 1983, Vol. I, p. 201 as follows:

> *First of all, counsel may seek to elicit testimony relating to the substantive issues helpful to his case or harmful to the opponents case. Secondly, he may seek to impugn the witness's credibility so that the trier of fact will discount the probative value of the testimony given during the examination-in-chief - sometimes called 'impeaching the witness' or 'impeaching his* [sic] *testimony'*. In addition, counsel may seek to elicit testimony relevant to the credibility of other witnesses. (emphasis added)

Professor Schiff then continues at p. 204:

> *The purposes of cross-examination define generally what counsel may do in the questioning of the witness, and also define what he* [sic] *must not do. Thus, counsel should not ask the witness any question seeking an answer irrelevant to a substantive issue or to the trier's assessment of that* (or some other) *witness's testimonial factors.* Moreover, counsel should not ask questions inviting testimony barred by exclusionary doctrine unrelated to relevancy, for example, the hearsay rule. (emphasis added)

This broad approach to cross-examination is also described by P. K. McWilliams, Q.C. in his *Canadian Criminal Evidence* ((2nd Ed.), Canada Law Book, Aurora, 1984 at p. 774 where he says: "Cross-examination as to credit may extend to collateral matters which, of course, cannot be led in chief, let alone be anticipated. The defence is not limited to matters which happen in the presence of the accused: *R.* v. *Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.)." In other words, Mr. Rosenblum, in this interpretation, would have been fully entitled to question Maynard Chant about what he said to the police, when he said it, *and* why he said it - and why he changed his story.

But as the second passage from Schiff quoted above indicates, the scope of cross-examination as to credit is not unlimited, particularly where the testimony sought to be elicited would also contravene another exclusionary rule, such as the hearsay rule if advanced for another purpose. The trial judge has a duty to exercise a discretion to see that the right of cross-examination is not abused. The standard by which to assess the exercise of discretion was set out by the Manitoba Court of Appeal in the widely cited case of *Rex* v. *Anderson*, [1938] 3 D.L.R. 317 at p. 321 as follows:

> *That full cross-examination of an opposite witness should be permitted by the trial judge is well settled. The judge may check cross-examination if it becomes irrelevant, or prolix, or insulting but so long as it may fairly be applied to the issue, or touches the credibility of the witness* [or another witness?] *it should not be excluded.* (question in square brackets added)

This problem was long ago described by the Supreme Court of Canada in *Brownell* v. *Brownell* (1909), 42 S.C.R. 368 at p. 373 in the following terms:

> *The character of this discretion, however, is such that its precise limits are not easily defined and in practice its exercise, though undoubtedly reviewable, must be left largely to the sound judgment and wisdom of the presiding judge who, from his observation of the demeanor of the witness and also the manner of and the conduct of the case by counsel, has means and opportunities of forming a correct opinion as to the importance and real purpose of questions propounded which are not open to an appellate court.*

In the trial of Mr. Marshall, the presiding judge was faced with the relatively rare circumstance of ruling on the admissibility of a question which would elicit an answer barred by the hearsay rule if offered for the truth of its contents, but justifiable if accepted as a challenge to an important Crown witness *who had yet to testify*. In accordance with the authorities represented by *Rex* v. *Anderson* and *Brownell* v. *Brownell* cited above, a court of appeal would in all likelihood have found the trial judge's decision to be incorrect. In retrospect, it is clear that the ruling closed, at least in part, what might have been an important avenue for the demonstration of Mr. Marshall's innocence. At the time, however, Mr. Rosenblum did not press his argument with such allegations as collusion between Mr. Chant and Mr. Pratico, or police misconduct during the questioning of witnesses. Indeed, in the absence of knowledge by Mr. Rosenblum of evidence for challenging Maynard Chant's credibility on such bases, to suggest them would have been highly improper. But a court of appeal might find it very difficult to say that foreclosing cross-examination on this issue involved "no substantial wrong or miscarriage of justice" *if* presented with facts to show how this could have been the case.

B. Cross-examination of Maynard Chant

Maynard Chant was called as a witness by the Crown and testified to have been an eyewitness to the stabbing of Sandy Seale. There was conflict between what he said on preliminary inquiry in identifying Mr. Marshall as the perpetrator of the crime, and his testimony at trial which was uncertain in this regard. The controversy about his being declared an adverse witness and being cross-examined by the Crown was dealt with on appeal before the Appellate Division of the Supreme Court of Nova Scotia in the decision cited earlier. It will not be canvassed in this opinion. However, in cross-examination by Mr. Rosenblum, the issue of the nature of police questioning and Maynard Chant's statements to police was the subject of testimony and will be examined here.

In the trial transcript there is an exchange between Mr. Rosenblum and Maynard Chant concerning the latter's conversation with police officers at the hospital and at the police station in the early morning hours after the stabbing. Also the subject of cross-examination were subsequent periods of questioning of Maynard Chant in Louisbourg and at the Sydney police station during which time he changed his version of the events, and identified Mr. Marshall as the perpetrator of the crime.

During these exchanges, and in accordance with the presiding judge's prior ruling, Mr. Rosenblum was at pains to elicit testimony that Maynard Chant had not implicated Mr. Marshall in the period immediately following the stabbing but only after prolonged police questioning. Mr. MacNeil raised his earlier unfounded objection about statements made "in the presence or absence of the accused". The court rejected this contention with the statement at p. 112 of the transcript:

He [Mr. Rosenblum] *is now perfectly within his rights to cross-examine* this witness *on the subject matter that he was proceeding with.* (emphasis added)

However, Mr. Rosenblum asked no questions about what the police said to Maynard Chant in their interrogation. This may be because of a fear that the hearsay rule would apply. But it might also be based on an interpretation of this intervention by the trial judge to the effect that the earlier evidentiary ruling was confirmed which seemed to exclude cross-examination, and perhaps direct examination (although this issue was never canvassed in argument) of any police officers who had questioned Maynard Chant, including Det. Sgt. John MacIntyre to whom Chant said he had told "the untrue story" - the one which presumably might have exculpated Mr. Marshall.

The result was that Mr. MacNeil for the Crown obtained from the court a ruling which limited the damage to Maynard Chant's credibility and had the effect, intended or unintended, of shielding the police from inquiry about their methods of investigation. However, this was a result in which Mr. Rosenblum, for reasons which do not appear in the transcript, seemed to have concurred. At page 116 of the Trial Transcript, there appears this enigmatic but perhaps revealing exchange:

By Mr. MacNeil: (Re-direct Exam)

Q. *You told my learned friend in your evidence that you told the police an untrue story. Why did you tell them an untrue story?*

A. *Because I was scared.*

Mr. Rosenblum:

Excuse me, just a moment. Now, My Lord, we're going into the recesses of a *man's mind. There's an old saying that even the devil doesn't know what's going on in a man's mind, it's not triable and for him now to give explanation as to why he did something or why he lied or why he lied to or why he lied yesterday or why he lied in the police station -*

The Court

I know. Any further questions?

Mr. MacNeil

No, no further questions but do I understand that Your Lordship won't allow that question.

Maynard Chant might have been afraid of reprisals from Mr. Marshall's friends, or from the police or for some other reason. Defence counsel seemed unwilling to pursue the matter, perhaps because he believed, with apparent good reason, that the court would not allow him to substantiate any response by questioning other witnesses on the issue. The impact on the trial is incalculable.

C. Examination and cross-examination of Marvel D. Mattson

Mr. Marvel D. Mattson was called as a witness by the Crown. He testified that as a result of a conversation he overheard in the street he called the police. Both Mr. MacNeil in direct examination and Mr. Rosenblum in cross-examination were very careful not to allow this witness to recount the contents of any conversation which he overheard. It may be that both counsel were fully apprised of what this witness had heard and were rightly of the view that to elicit it as evidence would only be to seek inadmissible hearsay. On the other hand, the arguments over the scope and applicability of the hearsay rule in relation to other witnesses do not encourage confidence in such a view. Both counsel and the presiding judge demonstrated an apparent confusion over the principle of multiple bases for the admission of evidence and the distinction between using out of court statements for hearsay and non-hearsay purposes. Mr. Mattson may have overheard remarks, the importance of which was not the truth of their contents, but the fact that such statements were made at the time they were made. In particular, such matters might have been explored in cross-examination, perhaps with the aid of a *voir dire*. But even if Mr. Rosenblum had been convinced that Mr. Mattson had important "non-hearsay" evidence to give, Mr. MacNeil's interpretation of the hearsay rule, which was apparently accepted in part by the presiding judge, would have precluded consideration of the matter.

III Hearsay, out of court statements and impeaching witnesses: the evidence of John Pratico

John Pratico testified in direct examination that he observed Donald Marshall, Jr. stab Sandy Seale in the stomach with a "shiny object". As one of two purported eyewitnesses to the homicide, one must conclude that his testimony was an important element in the jury's verdict of guilty. Where the accused's claim was that he did not commit the offence and that he saw someone else do it, John Pratico's credibility as a witness was crucial.

The two standard techniques for challenging a witness's credibility are (1) to cross-examine that witness to bring out inconsistencies which tend to show the witness to be lying, to have a poor memory, to have had no opportunity to really observe the events or to be incapable of accurately describing events observed, or (2) to obtain statements or evidence from *other* witnesses which contradict or "impeach" the principal witness's story. In relation to the first of these techniques, the law has traditionally allowed great scope in cross-examination. To cite the

Eleventh Edition of Phipson (which, as the transcript indicates, was available to the trial judge in the Marshall trial): "So, all questions may be asked in cross-examination which tend to expose the errors, omissions, inconsistencies, exaggerations or improbabilities of the witness's testimony." (p. 654) However, there are restrictive rules about the second technique of bringing in *other* witnesses to impeach the credibility of the principal witness, and these rules are particularly strict where one wishes to cross-examine or impeach one's own witness by having him declared hostile or adverse. The principal concern here is that it is the accused, not the witness who is on trial. Disputing the testimony of every witness with other witnesses raises potentially limitless collateral issues.

One evidentiary problem with the hearing of John Pratico's testimony was that the trial judge limited the scope of *cross-examination* by Mr. Khattar on prior inconsistent statements (technique 1) through the improper application of rules designed to limit *impeachment* of witnesses by other testimony (technique 2).

The afternoon before John Pratico was cross-examined he told a number of people outside the court room, including Mr. Khattar, Mr. MacNeil, the Sheriff, Det. Sgt. MacIntyre and Mr. Donald Marshall, Sr. that Donald Marshall, Jr. did *not* stab Sandy Seale (Trial Transcript, Page 148). This is a "prior inconsistent statement" which can be used to challenge the witness testimony to the contrary by probing in *cross-examination* whether he or she made the statement, why he or she made the statement, the circumstances surrounding the statement, etc. (technique 1). In accordance with the general rule as stated above by Phipson, cross-examination about such a statement may be extremely wide ranging. However, the precondition for obtaining evidence about such statements from other witnesses for the purpose of impeaching the principal witness's (i.e., Pratico's) credibility (technique 2) is governed by the *Canada Evidence Act*. Section 11 of the Act reads (and read in 1971):

Cross-examination as to previous oral statements

R.S.C. 1970, c.307

11. Where a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

This section would only have been applicable if Pratico had denied making the statement outside the courtroom. But this section of the *Canada Evidence Act* was used by the trial judge *not* to permit testimony from other witnesses about what John Pratico had said outside the courtroom following a denial, but rather to limit cross-examination of Pratico himself. The section was cited by the trial judge, and followed by the comment:

Trial Transcript, Page 154

So you have the right to ask him about any statement which he made to anyone inconsistently - but Mr. Khattar, let us limit ourselves to anything that he said that was inconsistent.

Mr. Khattar limited his questions to John Pratico to eliciting the names of those present when the statement was made, and the time at which they were made. That is, Mr. Khattar limited his cross-examination in accordance with the judge's application of Section 11 of the *Canada Evidence Act*. Whether Mr. Khattar might have wished to pursue in cross-examination the *reasons* for this prior inconsistent statement is a matter of strategy and is not clear from the transcript. It does seem clear, however, that the trial judge would have stopped him if he had attempted to do so.

When the trial judge limited defence counsel's cross-examination of John Pratico, he accorded the Crown a right of re-examination on the issue of prior inconsistent statements. However, he incorrectly limited re-examination by Mr. MacNeil as well. As the Phipson text available to the court correctly states (at p. 664): "The right to re-examination exists only when there has been cross-examination, and must be confined to the matters arising thereon." There was a *voir dire* on the extent to which questions might be put to the witness Pratico as to *why* he had made prior inconsistent statements, and the Crown wished to elicit evidence concerning alleged threats made by a number of persons (including the accused) to Pratico. The trial judge summarized his reasoning and his ruling on this point in the following passage

Trial Transcript, Page 169

> *Mr. Khattar, the witness was examined yesterday and today was subjected to a very searching and careful cross-examination and I found your cross-examination to be in order. But you have brought up the matter of inconsistent statements and now the law is that in re-examination a witness may explain - may explain - the reasons why he gave this inconsistent statement. That is the law Mr. Khattar. Now then, he cannot tell in court what somebody said to him because it was not in the presence of the accused. He cannot say what Donald Marshall, Sr. said to him or Theresa Paul or Tom Christmas. But there is no such prohibition relative to the reason why he gave this inconsistent statement affecting the accused himself. You see, Mr. Khattar, as was your right to bring out the inconsistent statement, now surely the law is that in re-examination the witness can explain why he gave an inconsistent statement.*

This reasoning is seriously flawed. It begins from the premise that Mr. Khattar had exercised a "right to bring out the inconsistent statement" but, for reasons explained above, ignores the fact that cross-examination concerning the statement had been improperly limited. It continues to declare inadmissible out of court conversation which might explain the motive for making the prior inconsistent statement, on what appears to be the incorrect interpretation of the hearsay rule discussed earlier. Moreover, the reasoning seems to adopt Mr. MacNeil's erroneous contention (discussed above and earlier both allowed and disavowed by the court) that only out of court statements made in the presence of the accused are admissible. The reasoning is correct only in so far as it states the proposition that a witness may explain in re-examination the reasons for having given a prior inconsistent statement.

The upshot of this approach was that in the re-examination, John Pratico stated that he had made prior inconsistent statements because he was "scared of his life". (Trial Transcript, Page 173) Furthermore, conversation between the court and counsel (Trial Transcript, Page 175), and questions from Mr. MacNeil identified a number of acquaintances of the accused who had been in contact with the witness Pratico after the murder and prior to the trial. However, because of the judge's ruling, there could be no exploration of the nature of any conversation which had occurred on these occasions. It is in this way that the trial judge incorrectly limited the Crown's right of re-examination. The trial judge then even appeared to limit exploration of any actual conversation between the witness and the accused, and concluded the matter with his own question:

Trial Transcript, Page 174

Q. *Now, your being scared of your life, is that because of anything the accused said to you at any time?*
A. *No.*

In the result, the jury might draw the conclusion that the witness had been threatened, and in all likelihood by acquaintances of the accused, but any attempt to find out what might have been said of a threatening nature was foreclosed to both Crown and defence. Furthermore, the limitation on cross-examination on the broader issue of why Pratico made conflicting statements was not allowed, while it might have clarified the question of whether threats were relevant to the problem at all. Given that the trial rested on the credibility of witnesses, it cannot be said that this curtailment of the cross-examination and re-examination of John Pratico might not have contributed significantly to "a substantial wrong or miscarriage of justice".

IV General Conclusions

In light of the foregoing analysis, general conclusions may be drawn concerning three broad sets of issues related to the evidentiary controversies in the Marshall trial discussed above, and a recommendation for improvement in the handling of evidentiary matters in criminal trials, like that of Mr. Marshall, may be made.

The first general conclusion relates to the manner in which a trial judge exercised his discretion in directing jurors as to how to appropriately evaluate the testimony which they heard. The analysis of the testimony of Mrs. Davis, Mr. and Mrs. Seale, Miss Harriss and Mr. Gushue indicates that the jury heard some evidence which was both irrelevant and potentially prejudicial, as well as other evidence which, while relevant, was of controverted weight. The trial judge's charge to the jury did not carefully identify for the jurors the evidence from these witnesses which they could not consider in reaching their verdict, and that which they should regard with caution because of its limited weight. While it cannot be said that any one of these matters, if taken alone, would inevitably have led to Mr. Marshall's wrongful conviction, taken as a whole they may have contributed to the jury's process of reaching the false conclusion that Mr. Marshall's version of the events could not be believed and that he was guilty.

The second general conclusion relates to the manner in which the concept of hearsay was used by the trial judge to support evidentiary rulings. In either direct examination, cross-examination or re-examination of Mr. Mattson, Sgt. MacDonald, Maynard Chant and John Pratico, out of court conversations were not related to the jury on the erroneous theory that their admission would contravene the rule excluding hearsay evidence. Some of these conversations, if admitted, might have had the effect of enhancing Mr. Marshall's credibility and challenging or destroying the credibility of the purported eyewitnesses. Whether defence counsel would have availed themselves of the opportunity to present evidence of such conversations to the court would depend on what they knew of such conversations through their own investigations, from disclosure, if any, by the Crown or from the preliminary inquiry. What can be said, however, is that the trial judge's approach to hearsay (often acquiesced in by Crown and defence counsel) precluded the jury from hearing admissible evidence relevant to the credibility of important witnesses in the case.

The third general conclusion concerns the way in which the trial judge limited cross-examination of Maynard Chant and John Pratico, the two purported eyewitnesses to the murder. As a result of the misapplication of the hearsay concept and the trial judge's confusion over the use and challenging of prior inconsistent statements, cross-examination of the Crown's two most important witnesses was incorrectly limited so as to prevent their credibility from being challenged. Once again, the extent of any challenge would have depended on how defence counsel used information available to them through their own investigation, from Crown disclosure, or from evidence taken on preliminary inquiry.

The recommendations relate to the present state of the law of evidence in Canada, and its use and application in criminal trials, such as that of Donald Marshall, Jr. The law of evidence in Canada is needlessly complex and difficult to master. As the matters canvassed in this opinion indicate, the trial judge and three experienced counsel appear to have been unclear about a number of important aspects of the law of evidence. The trial of Donald Marshall, Jr. represents a dramatic illustration of the need for reform in the evidence law in Canada. As the Law Reform Commission of Canada said in 1975 in its *Report on Evidence* to the Parliament of Canada, at p. 5, "While we are satisfied that rules of evidence are necessary to maintain a reasonable degree of consistency in court procedure, the time has surely come for a reformulation on broader lines. What is needed are easily available, clear and flexible rules."

Since the release of the Law Reform Commission's *Report on Evidence*, the Government of Nova Scotia, along with the governments of five other Canadian jurisdictions (Canada, Ontario, Quebec, British Columbia and Alberta) established a Federal/Provincial Task Force on Uniform Rules of Evidence. The report of this Task Force was released in 1982 and was the subject of broad consultation with the legal profession and the general public. The Department of Justice of Canada has drafted a new *Canada Evidence Act* as a result of this process which would restate the law of evidence in a more comprehensible form which might assist trial judges and litigation counsel in more easily resolving evidentiary issues to ensure fairness and uniformity in the administration of criminal justice. The Provincial Government, in light of the trial of Donald Marshall, Jr. should be urged to press the Federal Government to enact immediately its proposed legislation to reform the law of evidence. Furthermore, the Government of Nova Scotia should introduce a parallel reform to the Nova Scotia *Evidence Act* to ensure uniformity where possible in the rules of evidence to be applied in federal and provincial proceedings in the province.

Without limiting the generality of this recommendation concerning the benefits to the administration of justice of a general restatement or reform of the *whole* of the law of evidence, the following example may be apposite. The latest draft of the proposed *Canada Evidence Act* contains the following provision:

92. A party may cross-examine any witness not called by the party on all facts in issue and on all matters relevant to the credibility of the witness, and on cross-examination may ask the witness leading questions.

Had such a provision been found in the *Canada Evidence Act* at the time of Mr. Marshall's trial, the confusion which lead to the curtailment of the cross-examination of John Pratico by Mr. Khattar might easily have been avoided.

14

Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons

The following guidelines include a rationale for compensation and criteria for both eligibility and quantum of compensation. Such guidelines form the basis of a national standard to be applied in instances in which the question of compensation arises.

A. Rationale

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for those persons that have been wrongfully convicted and imprisoned. In appropriate cases, compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

B. Guidelines for eligibility to apply for compensation

The following are prerequisites for eligibility for compensation:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.

2. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.

3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.

4. As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [now 749(2)] of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [now 690(b)].

5. Eligibility for compensation would only arise when Sections 617 and 683 [now 690 and 749] were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), a further criteria would require:

(a) If a pardon is granted under Section 683 [now 749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or

(b) If a reference is made by the Minister of Justice under Section 617(b) [now 690(b)], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [now 690(c)], to the effect that the person did not commit the offence.

It should be noted that Sections 617 and 683 [now 690 and 749] may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal has been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

C. Procedure

When an individual meets the eligibility criteria, the Provincial or Federal Minister responsible for criminal justice will undertake to have appointed, either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below. The Provincial or Federal Governments would undertake to act on the report submitted by the Commission of Inquiry.

D. Considerations for determining quantum

The quantum of compensation shall be determined having regard to the following considerations:

1. Non-pecuniary Losses

(a) Loss of liberty and the physical and mental harshness and indignities of incarceration;

(b) Loss of reputation which would take into account a consideration of any previous criminal record;

(c) Loss or interruption of family or other personal relationships.

Compensation for non-pecuniary losses should not exceed $100,000.

2. Pecuniary Losses

(a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

(b) Loss of future earning abilities;

(c) Loss of property or other consequential financial losses resulting from incarceration.

In assessing the above mentioned amounts, the inquiring body must take into account the following factors:

(a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;

(b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

Reasonable costs incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation.

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Canadian Bar Association, Nova Scotia Branch, Submission to the Royal Commission on the Donald Marshall, Jr., Prosecution

(excluding appendices)

Foreword

When the Government of Nova Scotia established the Royal Commission on the Prosecution of Donald Marshall, Jr., on the 20th day of October 1986, it was natural for the Canadian Bar Association to become involved. The findings of this Royal Commission will, without doubt, become a "watershed" for reform of certain neglected and tired aspects of the criminal justice system, especially some of its procedural safeguards which failed at almost every turn in this case.

Aside from the important matters of police and prosecutorial conduct and the findings of fact which evolve therefrom, the key to uncovering the injustice to Donald Marshall, in the opinion of this submission, turns on the Crown's failure to disclose exculpatory (favourable to the accused) evidence to Donald Marshall or his counsel before, during or after his trial and appeal. It is this obligation to disclose evidence favourable to the accused which will be carefully examined in this submission. This report further endeavours to recommend some solutions and methods to improve the disclosure practice by the Crown to the accused and its counsel.

Acknowledgements

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Gordon F. Proudfoot
Halifax, Nova Scotia
October 28, 1988

Introduction

What information to disclose to an accused in a criminal matters is a question that has long vexed the legal profession. The answer to this question requires a balancing between the interests of the State in the administration of criminal justice and the right of the accused to a fair trial. On one hand, Crown prosecutors are understandably reticent to release information that, if misused, could result in justice not being done. Witness tampering, fabrication of evidence and alibis to meet the Crown's stated case, and the elimination of surprise are just three of the concerns Crown prosecutors raise when asked to broaden the scope of information to be disclosed to lawyers for an accused. On the other hand, lawyers for the defence need sufficient information for the preparation of their case and it is the State that generally controls access to that information. Defence counsel need to know not just the evidence against the accused but the evidence in his or her favour along with evidence that is apparently neutral, suggesting neither guilt nor innocence. Only with full and timely access to the information gathered by agents of the State can defence lawyers properly discharge their burden of holding the State to the criminal burden of proof.

It has long been accepted as indispensable for the fair administration of criminal justice in our society that some access by the accused to the State's case against him/her is required. But, what type of access? To statements? To witnesses? To an accused's entire file? And when should access take place? Before the trial? During the trial? Or after the trial if relevant evidence subsequently comes to the attention of the Crown? What this report seeks to do is, first, to historically review the duty of Crown counsel to disclose exculpatory evidence to the accused; second, to examine in a limited manner the general disclosure practice of prosecuting attorneys in a number of Canadian provinces and territories, the United States and in some foreign jurisdictions; third, to review canons of professional ethics relating to disclosure of State evidence to an accused; and finally, to draw from this review some solutions to improve Crown disclosure practice so that another Donald Marshall, Jr. case shall never occur again.

Chapter 1

Historical Review and the Law

There have never been nor are there today, any legislative requirements in Canada compelling Canadian prosecutors to make complete disclosure of their case to the defence prior to trial. Notwithstanding this legislative lacuna, there is one area to which Canadian judges have, from time to time, turned their attention and formulated general principles which establish a Crown duty of disclosure of exculpatory evidence.

In *Lemay* v. *The King*[1] the late Mr. Justice Locke declared that counsel for the prosecution must "...not hold back evidence because it would assist an accused ..."[2] This is not to say that as a result of this decision Crown counsel had an obligation to disclose all information in their possession tending to suggest innocence to counsel for an accused. Lawyers prosecuting criminal trials were, instead, to exercise discretion as to which witnesses were material and which were not. One commentator described the obligation as follows: "The word 'material' must be taken to refer to facts which are material either to guilt or to innocence, but in making a judgment in this situation, the Crown counsel must have regard to the reliability of the evidence in question. To attempt to go beyond that which has been indicated, and to formulate rules that must govern the exercise of the discretion, would, in effect, be putting an end to the discretion. The consequence of this conduct would be to hinder, rather than promote, the fair and impartial administration of criminal justice. It cannot be the rule that counsel for the prosecution must call each and every person who may be in a position to testify."[3] So, as formulated in the *Lemay* case, Crown counsel was not obliged, as a matter of principle, to call a witness where the effect of eliciting that testimony would be to allow a guilty person through, for example, perjury, to escape justice. Where, however, the effect of evidence disclosure would be to reveal facts material to the innocence of an accused, this consideration cannot apply and disclosure must be made.

Three years later, in 1955, the late Mr. Justice Ivan Rand further defined the disclosure duty of Crown prosecutors. In *Boucher* v. *The Queen*,[4] Rand J. wrote: "It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be reliable evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."[5] The principles embodied in this judgment would subsequently be mirrored in the *Canadian Bar Association Code of Professional Conduct* and in the various provincial law society codes.

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[1] [1952] 1 S.C.R. 232

[2] *Ibid.* at p. 241

[3] Keith Turner, "The Role of Crown Counsel in Canadian Prosecutions," (1962) 40 *Canadian Bar Review* 439 at p. 453

[4] [1955] S.C.R. 16

[5] *Ibid.* at pp. 23-24. See also *Richard* v. *The Queen* (1960), 126 C.C.C. 255 per Bridges J. A. at p. 280; *Regina* v. *Lalonde* (1972), 5 C.C.C.(2d) 168; and Martin, "Preparation for Trial," Law Society of Upper Canada, *Special Lectures*, 1969, p. 221 at p. 235 et seq; Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct*, (Toronto: Cartwright & Sons, 1957, p. 116ff.)

What commentary the disclosure principles of these judgments elicited was agreed: "The ethical obligations of a prosecutor as interpreted by the Supreme Court of Canada, require him, at a minimum, to disclose evidence favourable to the accused at some stage prior to the verdict."[6] This duty implicitly imposed an obligation on the police to disclose such evidence to the prosecutor.[7] The disclosure duty of the prosecutors was at best a minimum standard: "If the primary task of the prosecutor is to see that 'justice' is done, should he not disclose the evidence before the trial and should he not also allow the defence access to unfavourable evidence so that there is an opportunity to make any necessary investigations? Surely surprise does not always result in 'justice' being done? Surely 'justice' also requires that the accused have access to what appears to the prosecution to be neutral evidence. If discovery is denied, are we not merely paying 'lip service to grandiose concepts' and preventing them from having any practical effect by procedural rules which deny counsel access to the facts which he must know in order to make them effective?"[8] Notwithstanding this trenchant observation and seemingly clear statement of principle by the Supreme Court of Canada, the disclosure requirements of Crown prosecutors remained, as a matter of practice, largely unaffected by these judicial developments.

As late as 1968, Professor Brian A. Grosman of the Faculty of Law of McGill University observed that it was only those defence lawyers who were part of a "reciprocating environment" who received disclosure from the Crown. Those who were not, did not. What was this reciprocating environment? Those who are "trusted", Professor Grosman wrote, along with those who are "safe", will "obtain full disclosure of the prosecution's case prior to trial." How were these assessments made? "The defence lawyers is 'safe' if he enters a proportionate number of guilty pleas, does not utilize the evidence obtained in pre-trial disclosure for cross-examination of prosecution witnesses and is likely to enter a guilty plea after an assessment of the prosecution's evidentiary strength."[9] Dissatisfaction over this situation led to numerous calls by the defence bar and a recommendation to this effect from the Law Reform Commission of Canada for the institutionalization of a process of discovery, analogous to discovery in civil law, in criminal cases. "If defence counsel has an opportunity to discover the prosecution's case in advance, the weaknesses of the case can then be discussed with the prosecutor and the apparent strengths can be made the subject of further investigation ..."[10] The calls were unheeded. In fact, the only further developments to take place in this area were initiatives by the Canadian Bar Association and by some provincial law societies in the drafting and publication of guidelines for the ethical and professionally responsible practice of law, as well as issue of guidelines by the Ontario Ministry of the Attorney General and by a recommendation of the Uniform Law Conference. The canons of professional conduct will be reviewed in Chapter 5 of this brief. The recommendations of the Uniform Law Conference will be considered in the next section of this brief.

While these developments brought about some positive change, disclosure of exculpatory evidence does not, even today, occur in every case. Indeed, inadequate and incomplete disclosure continues to potentially affect some criminally accused. *Re Cunliffe*[11] is a recent case in point. The Crown prosecutor in that case knew of the existence of witnesses favourable to the accused who had been charged with murder but did not disclose their existence to the lawyer for the defence. The Law Society of British Columbia ruled that failure to disclose this material evidence constituted professional misconduct.

The Law Reform Commission of Canada has examined the issue of Crown disclosure to the defence on two occasions. In 1974, they produced the Report,

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[6] Anthony Hopper, "Discovery in Criminal Cases," (1972) 50 *Canadian Bar Review* 445 at p. 469

[7] *Ibid.* Indeed, according to Lord Devlin this obligation was, in fact, a legal duty. It was "strongly arguable that police or prosecutors who suppress evidence favourable to the accused are guilty of obstructing justice".

[8] *Ibid.*

[9] Brian A. Grosman, "The Role of the Prosecutor," (1968) 11 *Canadian Bar Review* 580 at p. 586

[10] Anthony Hopper, "Discovery in Criminal Cases," (1972) 50 *Canadian Bar Review* 445 at p. 465. See also *Criminal Procedure - Discovery*, Working Paper No. 4, Law Reform Commission of Canada; John Sopinka, "Criminal Procedure: Discovery," (1975) 7 *Ottawa Law Review*, 288ff.

[11] *Re Cunliffe and Law Society of British Columbia* (1984), 13 C.C.C.(3d) 560

Discovering Criminal Cases (1974). The recommendations included the requirement for the prosecution to disclose to the defence not only statements of witnesses it proposed to call, but also the identity of persons who had provided information to police or prosecutors. The Commission recommended that legislation be implemented to set out the rules for disclosure.

The Law Reform Commission again dealt with this issue in its 1984 Report entitled, *Disclosure by the Prosecution*, and made recommendations which included the incorporation of a Crown disclosure procedure in an amendment to the *Criminal Code*.

Chapter 2
The Practice and The Canadian Scene

Until recently Crown disclosure usually took place in an *ad hoc* fashion, often the result of personal relationships between Crown attorneys and the defence bar. The disclosure was often supplemented by defence counsel using the preliminary inquiry as a means of learning about the Crown case against an accused.

The preliminary inquiry as presently constituted, however, offers little in the way of an opportunity for discovery by defence counsel as the purpose of it, as stated in the *Criminal Code* and by the Supreme Court of Canada, is to determine whether there is sufficient evidence to put the accused on trial.[12] In some jurisdictions local Crown attorneys call only enough evidence to satisfy the preliminary burden of proof to see the case put over for trial. In other jurisdictions more complete disclosure is made. The result of differing practices is a morass of case law concerning adduction of new evidence by the Crown during the actual trial of an accused and, more importantly, unfairness to the accused. Moreover, preliminary inquiries are a slow, expensive and inefficient means for providing an accused with information about the case the State will try to make in court. Nevertheless, in some jurisdictions preliminary inquiries remain the only means, pursuant to the relevant provisions of the *Criminal Code*, through which the accused can obtain access to information about the Crown's case.

Concern over inadequate and varying disclosure processes led Ontario Attorney General Roy McMurtry, in 1981, to table in the Ontario Legislature guidelines subsequently issued to Crown prosecutors respecting disclosure in criminal cases. These guidelines are reproduced completely in Appendix E to this report.

The guidelines recognize the general duty of Crown counsel to disclose both the Crown's case and make the defence aware of any relevant evidence that may be helpful to the defence and that is worthy of consideration by the court, but which the Crown may not intend to call as part of the case for prosecution. The guidelines do not set out specific procedures for providing disclosure nor do they establish any mechanism for ensuring uniformity in disclosure. Rather they create a discretionary regimen under which disclosure will be determined by the local Crown attorney in accordance with local Crown and police resources and with the needs of the local defence bar. As a result, disclosure practices vary throughout the province of Ontario. The decision to provide guidelines on disclosure rather than rules was, apparently, a deliberate one. It was made in order to ensure flexibility and to give Crown counsel discretion in their application depending on local conditions. The notion behind the retention of discretion was to provide a means of ensuring that certain information that could lead either to injustice through perjury or injury to witnesses and victims remain confidential. However, the defence bar charges that the decision to retain discretion over disclosure has proved both unworkable and, in some cases, unfair. In some localities Crown counsel provide defence lawyers with near-to-complete access to an accused's file, but in other localities only limited disclosure is made. The defence bar in Ontario has asked, on at least one occasion, that the guidelines be replaced with legislation stipulating mandatory practice and procedure for defence access to Crown information.[13]

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[12] *Patterson v. The Queen*, [1970] S.C.R. 409 at p. 412

Disclosure requirements of Ontario Crown counsel was one of the matters considered by the Hon. Mr. Justice T. G. Zuber. In his recently issued, *Report of the Ontario Courts Inquiry*, Mr. Justice Zuber reviewed the practice and problems of Crown disclosure in Ontario. Justice Zuber noted that while the guidelines improved the overall practice of Crown disclosure, serious difficulties remain. One of the first problems that Justice Zuber identified was unavailability of Crown prosecutors with sufficient time to devote to making adequate disclosure. Justice Zuber recommended that additional Crown prosecutors be hired.

Another problem that was brought to Justice Zuber's attention, in the form of submissions from the defence bar, was the degree of Crown disclosure. These submissions urged Justice Zuber to recommend that more detail respecting the Crown's case be disclosed and that copies of witness statements be provided rather than simple summaries or outlines of the testimony witnesses are expect to give. Mr. Justice Zuber, however, was satisfied that adequate disclosure was being made and that no changes were necessary in this area.

Where Mr. Justice Zuber did recommend change was in respect of the guidelines themselves. Justice Zuber adopted the submission of the defence bar that because the guidelines were only guidelines they were not being uniformly followed. "In some areas of the province, full disclosure is made but, in others, it is inadequately made."[14] The explanation for inadequate disclosure was concern over fabrication of testimony to meet expected evidence. Mr. Justice Zuber, while cognizant of this potential problem, stated that he was "not convinced that this possibility is so great that it should lead to a shutdown of the disclosure process in some areas of the province."[15] Furthermore, Mr. Justice Zuber added, it did not "appear reasonable that the likelihood of fabricated defenses is the subject of such variation from region to region to justify a similar variation in the disclosure process. If disclosure in a particular region is perceived to lead to reasonable grounds for believing that defenses are being fabricated, then the appropriate remedy is to initiate an investigation with a view to laying criminal charges for obstructing justice, or some like criminal offence."[16] Having concluded that the guidelines were not being uniformly applied, and that no compelling reason existed for variations in their application, Mr. Justice Zuber recommended that the Attorney General upgrade the existing guidelines respecting Crown disclosure to the status of a directive to be observed unless the Crown prosecutor could demonstrate to the Attorney General why, in a particular case, disclosure should not be made.

In preparation for this submission, a questionnaire was sent to all provincial Attorneys General with regard to Crown disclosure. Many of the provinces have adopted the *Uniform Law Conference Disclosure Guidelines* which are reproduced in their entirety in Appendix D of this report. At the present time, these guidelines have been adopted by the Provinces of Manitoba, Alberta, New Brunswick and Nova Scotia (as of July 22, 1988). These rules acknowledge the general duty on the part of the Crown to disclose the case-in-chief for the prosecution to counsel for the accused. Furthermore, the guidelines provide for the continuing disclosure of any new and relevant evidence that becomes known to the Crown.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without the need for further requirement for disclosure.[17]

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[13] See "Has Crown's disclosure duty changed with Charter?", *The Lawyers' Weekly*, October 10, 1986, pp. 10-11

[14] The Hon. Mr. Justice Thomas Zuber, "Report of the Ontario Courts Inquiry," Toronto: Ministry of the Attorney General, 1987 at p. 233

[15] *Ibid.* at p. 234

[16] *Ibid.*

While the *Uniform Law Conference Disclosure Guidelines* appear to be progressive, there are many shortcomings, some of which include:

1. The continuing obligation to disclose is on the "prosecution" not the police, yet the police are often the gatherers and recipients of new evidence.

2. The evidence must be "new" to be provided to the defence under the continuing obligation to disclose rule. Numerous appeals in the U.S. and in Australia by the defence on inadequate disclosure have been lost because the Court held that the evidence was not "new". (See Appendices B and C)

3. The new evidence referred to must also be "relevant". It is left to the discretion of the Crown to decide if the new evidence is relevant. Obviously, if new evidence is developed in a case, it should be provided to the defence. What is considered relevant evidence to the defence may not be relevant to the prosecution.

4. Under the Guidelines the Crown may still refuse to disclose names and addresses of "potential witnesses" because of the perceived need to protect these witnesses from intimidation and harassment. This rule is contrary to the spirit of full disclosure. One cannot assume defence counsel would approach a witness in other than a professional manner. There are serious consequences in the *Criminal Code* for anyone who intimidates, threatens or harasses witnesses. However, there may be a rare occasion where a potential witness cannot be identified and their identity should be protected by an application to the Court. However, their evidence should still be disclosed.

5. Disclosure to an unrepresented accused by the Crown is left to the discretion of the Attorney General. This is unfair to an accused who has the right to represent himself and make full answer and defence. It is difficult to see how a guideline such as this does not violate the *Canadian Charter of Rights and Freedoms*.

6. The final clause of the Uniform Guidelines provides that, "...full and fair disclosure should be given *unless there is* a demonstrable need that such full and fair disclosure should not be given." The vagaries of what a "demonstrable need" may be in the eyes of a prosecutor invites problems.

7. The Guidelines do not provide for aggrieved parties seeking Crown disclosure to appeal a decision not to disclose.

8. There is no mention in the Guidelines of the obligation on the Crown to advise the defence what the nature of the information is the Crown has not disclosed and the reasons for the denial.

9. Finally, the Guidelines provide no sanctions which the defence can seek to enforce against the Crown to ensure compliance to the Guidelines.

Some provinces, however, have made some marked improvements over the *Uniform Law Conference Disclosure Guidelines*. Manitoba's Guidelines have restrictions on disclosing police information that is collected during investigation. Police investigatory records are not released to defence counsel without the consent of the police. The Manitoba Guidelines require the disclosure of witnesses' names favourable to the accused but there is no obligation to provide information on what these witnesses would say. The Guidelines further stipulate that all disclosure information is to be revealed on a "timely basis", but it is unclear what this means.

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[17] *Uniform Law Conference Disclosure Guidelines*, Uniform Law Conference, Halifax, 1985

Nova Scotia has recently invoked new Disclosure Guidelines which provide for fuller disclosure. Prior to the recent amendments, defence counsel were only entitled to read and not photocopy a "will say" statement of a witness. The new Guidelines entitle defence counsel to photocopies of all written signed statements. It would appear this only applies to witnesses to be called in the Crown's case-in-chief.

It may be argued, however, that Nova Scotia has actually taken a step backward with its new Disclosure Guidelines. Under the Uniform Guidelines, an accused is entitled to a "summary of witnesses' statements or the contents of witnesses' statements". Now in Nova Scotia an accused is only entitled to a "summary prepared by the investigating police agency of the case as a whole". The new Guidelines say the defence is entitled to "all written statements made by witnesses" to be called by the Crown. This does not include someone who did not give a written statement but who the Crown intends to call. Second, the Uniform Guidelines permit Crown disclosure of the criminal records of certain witnesses. The new Nova Scotia guidelines make no such provision. Where the defence has no access to CPIC (Canadian Police Information Centre) or other data sources, this may prejudice the defence.

No province, however, specifically provides for the disclosure of information that comes to light after the trial process has commenced, nor after the trial process has concluded. The only mention in the Uniform Guidelines is the "continuing obligation" to disclose but it does not define the time frame. Crown non-disclosure of exculpatory evidence during and after the trial was a crucial factor in the conviction of Donald Marshall.

Similarly, Crown discretion in disclosure also invites reform. A close examination of the *B.C. Crown Manual*[18] demonstrates a myopic attitude toward discretionary Crown disclosure. The Manual states:

> *To release these comments and opinions (from police) except in extraordinary circumstances would discourage the investigator from providing these to Crown counsel...These comments are not provided to defence unless counsel decides that the proper administration of justice requires it.*

Crown counsel's discretion is so broad and subjective that the B.C. Guidelines are seriously flawed.

Chapter 3
The United States Situation

State disclosure of evidence to accused persons is not just a matter of rules or canons of professional ethics, it is a question of constitutional law. According to the Supreme Court of the United States, the suppression by the prosecution of evidence that is material either to guilt or innocence violates the due process clause of the Bill of Rights. In *Mooney* v. *Holohan*[19] the Supreme Court held that the State's knowing and intentional use of perjured testimony to obtain a conviction violated a defendant's right to due process and to a fair trial. In *Alcorta* v. *Texas*[20] the duty of the prosecution to disclose evidence to the accused was further broadened. That case concerned the failure of the prosecution to reveal to the accused perjured material evidence which resulted in the accused being convicted of a more serious offence than he would have been had the perjury been revealed.

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[18] See Appendix A

[19] 294 U.S. 103 (1935). See also *Pyle* v. *Kansas*, 317 U.S. 213 (1942)

[20] 355 U.S. 28 (1957)

Failure to bring the perjury to the attention of the accused was a denial of the due process provisions of the Bill of Rights. This issue was also canvassed in *Napue* v. *Illinois*.[21] In *Brady* v. *Maryland*[22] the duty to disclose was further developed. The Supreme Court held that "the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[23] The issue, according to one of numerous academic commentaries on the decision, was "not prosecutorial misconduct, but rather the defendant's constitutional right of access to favourable testimony."[24]

What the *Brady* case stands for is not the proposition that American prosecutors must open their files to criminally accused, but that they must disclose material evidence favourable to the accused. The distinction is, of course, that access to exculpatory evidence cannot impede the vindication of justice while access to inculpatory evidence can.

While the *Brady* case makes clear that material exculpatory evidence must be disclosed to the accused, not evident from the decision were the means for doing so. The result was to reserve to prosecuting attorneys the discretion of deciding what evidence was favourable to an accused and what evidence was not. Criminally accused cannot help but believe that important decisions concerning evidence disclosure are, in these circumstances, being made by a biased party. At the very least, the prosecutor is faced with the almost impossible task of sifting through the evidence brought to his or her attention and attempting to determine which evidence is material and favourable to the accused and therefore subject to disclosure. This aspect of the *Brady* decision has received considerable academic commentary and criticism.[25]

Following the *Brady* decision, American courts struggled to accommodate the Supreme Court requirement that the prosecutor disclose material evidence within the traditional adversarial system of criminal prosecution amid prosecutorial fears of an "open file" rule that members of the criminal bar claimed *Brady* had brought about. A trilogy of cases that reached the Supreme Court in the decade following *Brady* failed to provide lower courts with much guidance as to what constituted materiality insofar as the prosecutor's duty to disclose evidence was concerned. However, the Supreme Court of the United States again considered the disclosure obligation of prosecuting attorneys in *United States* v. *Agurs*.[26]

Agurs, while not modifying the requirement of disclosure of exculpatory evidence, placed on attorneys for the defence certain obligations for the identification of such evidence without providing them with more generalized access to prosecutors' files. Put another way, it became incumbent upon defence attorneys to request exculpatory evidence from prosecutors rather than for prosecutors to automatically disclose such evidence to the defence. This decision led, in the United States, to a number of reform proposals including a recommendation calling for pre-trial *in camera* review of all information in possession of the prosecutor. The two key benefits of this reform proposal were that any such review would remove prosecutorial discretion in the identification of evidence beneficial to the accused, while avoiding the potential pitfalls of an "open file" rule. At the same time, it would relieve the defence attorney of any obligation to inquire into the existence of evidence favourable to the accused, an onerous, impractical and unfair burden considering that knowledge of any such evidence is in the hands of the prosecution. Implementation of this suggested reform was, perhaps, made unnecessary by a subsequent and, to date, the latest, Supreme Court decision on point.

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[21] 360 U.S. 264 (1959)

[22] 373 U.S. 83 (1963)

[23] *Ibid.* at p. 87

[24] Daniel J. Capra, "Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review," (1984) 53 *Fordham Law Review* 391 at p. 393. See also *Biglio* v. *United States*, 405 U.S. 150 (1972)

[25] See Capra, "Access to Exculpatory Evidence," at p. 392ff. Most of the other comments on the decision have been gathered together and are cited in Paul L. Caron, "The Capital Defendant's Right to Obtain Exculpatory Evidence from the Prosecution to Present in Mitigation Before Sentencing," [1985] 23 *American Criminal Law Review* 207

[26] 427 U.S. 97 (1976)

In *United States* v. *Bagley*[27] the court held that a single due process test applied to a prosecutor's non-disclosure of exculpatory evidence regardless of the request, if any, for the disclosure of such evidence. Exculpatory evidence, under the new test, was material "only if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."[28] The test is a stringent one and has been subjected to searching criticism, for under it, challenge to the prosecutorial non-disclosure of evidence will prove more difficult, and less successful, whether or not counsel for the defence has made a request for exculpatory evidence.

Notwithstanding the deficiencies of this decision, prosecutors who fail to disclose exculpatory evidence do so at their own peril. The general rule is that exculpatory evidence must be disclosed. Failure to do so, however, is not easily subject to review, for in almost all cases the accused will have no way of knowing that his or her due process rights have been breached. As a practical matter, the fact remains that notwithstanding this broad requirement to disclose, the discretion as to what to disclose remains with the prosecutor and absent any effective means of subjecting that discretion to review, it may be exercised so as to deny defendants their constitutional rights. And even when a failure to disclose is revealed, the Supreme Court test of a "reasonable probability" standard will be extremely difficult to meet. American common law suggests that constitutional guarantees alone are not enough to ensure disclosure of exculpatory evidence. What is required is a practical means of making exculpatory evidence available in every case and making that means subject to some kind of review.

In a review of legal and ethical requirements for State disclosure to the accused in the United States, 37 states responded (see Appendix B) to a request for information. The vast majority of American states have transcended the constitutional verbiage of such decisions as *Brady* v. *Maryland*, *United States* v. *Agurs*, and *United States* v. *Bagley* (supra), to arrive at practical, criminal procedural requirements regarding state disclosure. Of particular note, are the States of Arizona, Florida, Hawaii, Maine, Massachusetts and Maryland. These States have enacted rules of criminal procedure that attempt to codify the constitutional requirement of State disclosure of exculpatory evidence. The phraseology generally employed therein is:

> *...any material or information within the State's possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor"*. Rule 15.1(a)(7), *Arizona Rules of Criminal Procedure*.

Many States, however, do not provide for automatic disclosure as of right; but rather, require a written request or motion by the defence to trigger the disclosure procedure. Moreover, as earlier indicated, much discretion still rests with the prosecution in deciding what evidence is and is not favourable to the accused. Many States, however, have also specifically stated what evidence shall be furnished to the accused, e.g., written or recorded statements made by the defendant, the result of a search and seizure or wiretap, names and addresses of all witnesses which the prosecutor intends to call, and all written or recorded statements.

The majority of States also provide for a "continuing duty of disclosure". In most instances this is limited to additional material or information that is discovered *before* or *during* trial and was previously requested by the accused.

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27. 105 St. Ct. 3375 (1985)

28. *Ibid.* at p. 3384

Only a very small percentage of those States who responded have enacted criminal procedure rules which call for the mandatory disclosure of police-held exculpatory evidence and/or names of State witnesses to the accused. Arizona, Hawaii, Nebraska and Vermont extend the duty of disclosure to material and information within the custody or control of those who have participated in the investigation or evaluation of the case.

In a great number of States there is an added element to the process of disclosure in criminal prosecutions - the requirement of "reciprocal discovery". Arizona, Florida, Hawaii, Maine and Massachusetts are but a few examples of U.S. States that require disclosure by the accused. Generally, this is limited to submission to tests, examinations and inspection of the accused. However, in some instances if the accused demands disclosure, the following information and material which corresponds to that which the accused sought, must be disclosed to the prosecutor, e.g., the name, address and statement(s) of any person whom the accused expects to call as a trial witness, reports or statements of experts made in connection with the particular case, and tangible papers or objects which the defence counsel intends to use at trial (e.g., Rule 3.220(b)(4), *Florida Rules of Criminal Procedure*).

The majority of States who responded to the question of whether ethical requirements for State disclosure exists answered in the affirmative. Most of these States have adopted the *ABA Model Code of Professional Responsibility* which requires a prosecutor to make "timely disclosure" to the defence counsel, or to the defendant who has no counsel, of the existence of evidence or information "known to the prosecutor...that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." (*Disciplinary Rule* (DR) 7-103(B)) Exculpatory evidence falls within this standard. The ABA has also developed *Standards of Criminal Justice Relating to the Prosecution Function*, which expand on the Model Code and have been adopted in some American jurisdictions. Standard 3-3.11(1) states that it is "unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defence, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused." It is also unethical for a prosecutor to intentionally "avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." (Standard 3-3.11(c))

In conclusion, most U.S. States have either enacted or are in the process of enacting legislation respecting the ethical and legal requirements for State disclosure. State statutes require prosecutors to respond to requests from the defence for exculpatory material and information. Generally, the prosecutor's duty to disclose begins before the trial and continues throughout the proceeding if additional material or evidence is discovered.

A 1946 case, *R.* v. *Bryant and Dickson*[29] stands for the proposition that "where the prosecution has taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and address."[30] This case is not authority for the proposition that the Crown is required, in these circumstances, to provide the defence with copies of any statement a witness might make, as only the name and address are required. Arguably, this limitation is not reconcilable with further judicial consideration of the subject, including the observations of Lord Denning, M.R.

Lord Denning has described the duty of the Crown prosecutor to disclose evidence beneficial to the accused as follows: "The duty of a [prosecutor]...is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If [he/she]...knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish."[31]

Lord Denning's views on the disclosure duty of Crown counsel was considered in *R.* v. *Leyland Magistrates, ex parte Hawthorn*.[32] In that case, the applicant was convicted for driving without due care and attention. It was subsequently learnt that two witnesses known to the police were not called at trial. The applicant sought judicial review to quash his conviction on the ground of the failure of the police to notify him of the existence of witnesses before the trial. The court held that the failure of the prosecution to notify the applicant of the existence of the evidence prevented the applicant from receiving a fair trial. The conviction was, accordingly, quashed.

Concern over inadequate and incomplete disclosure led to the introduction of Disclosure Guidelines in England and Wales in 1982. These guidelines are reproduced in their entirety in Appendix H to this report.[33] The English Guidelines are extremely detailed and complex. However, in respect of one matter, the duty to disclose exculpatory evidence to lawyers for the accused, these guidelines are crystal clear. Any information that is or might be true, and which would go toward establishing the innocence of the accused or casting some doubt upon his guilt or upon some material part of the evidence relied on by the Crown, must be disclosed. Also, in 1985, special rules for disclosure were approved entitled, *Magistrates' Courts (Advance Information Rules 1985(a)* (See Appendix I).

Where the information that must be disclosed is of a highly sensitive nature the Guidelines provide for means to protect the interest that disclosure might affect, such as by blanking out the sensitive section of a statement. The exceptions to the general duty to disclose exculpatory evidence are set out in Section 13 of the Guidelines and they do not appear to significantly limit the general duty to disclose. But it must be observed that these Guidelines appear to be just that: guidelines. And it also appears that considerable discretion is left to Crown prosecutors and their instructing solicitors as to what should be disclosed and what should not. Moreover, it should be noted that the defence is not provided with the same opportunity for discovery in Great Britain, as in Canada, as the English preliminary hearing is shorter and less reliant on the adduction of *viva voce* testimony.

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[29] (1946) Cr. App. R. 146

[30] See Archbold, *Criminal Pleadings, Evidence and Practice*, London: Sweet and Maxwell, 1985 p. 331ff.

[31] *Dallison* v. *Caffrey*, [1965] 1 Q.B. 348 at p. 369. However, see Diplock L.J. at p. 376 and *R.* v. *Fenn*. For ruminations on this matter see, Lord Denning, *The Road to Justice*, (London: Sweet & Maxwell, 1955) pp. 36-37. For suggestions for future reform see, [1966] *Criminal Law Review*, 602 and undated report, "Availability of Prosecution Evidence for the Defence," cited in Anthony Hopper, "Discovery in Criminal Cases," 50 *Canadian Bar Review*, 445 at p. 477, footnote 160

[32] [1979] 1 All E.R. 207

[33] See Practice Note, [1982] 1 All E.R. 734 and see also Archbold, *Criminal Pleadings, Evidence and Practice*, p. 328ff.

Chapter 5
Ethical Considerations

The essence of professional responsibility is that the lawyer must act at all times uberrimae fidei, *with utmost good faith to the court, to the client, to other lawyers, and to members of the public.*

(Canadian Bar Association Code of Professional Conduct)

Canadian codes of professional conduct establish minimum standards for the protection of the public. In the same way that provincial law societies have been given the duty of regulating the legal profession in the public's interest, the Canadian Bar Association and a number of provincial law societies have sought, through the promulgation of codes of professional conduct, to establish standards for the ethical practice of law. Codes of professional conduct cannot, and indeed do not, set out fixed rules to be followed by members of the profession. Rather, they set out guiding principles - principles that do not profess to establish standards for every ethical dilemma encountered by members of the bar, but guidelines that lawyers can look to for determining acceptable and unacceptable professional conduct.

(a) In Canada

At its Fifth Annual Meeting in September 1920, the Canadian Bar Association adopted a canon of ethical principles to be observed by members of the legal profession in Canada. Canon 1(2) thereof provided that: "When engaged as a public prosecutor [the lawyer's] primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused." Since then, the Canadian Bar Association has remained active in reviewing and revising the ethical principles to be followed by the legal profession and has, in fact, taken a leadership role in this area. Today, the *Canadian Bar Association Code of Professional Conduct* has been adopted by a number of provincial law societies. The Nova Scotia Barristers Society adopted the CBA Code in 1974. Where the disclosure duty of the prosecutor is concerned, the ethical considerations of the 1920s remain very much alive today.

Chapter One of the current CBA Code states that integrity is the fundamental and indispensable quality of any person seeking to practice law. "The lawyer," the Code says, "must discharge with integrity all duties owed to clients, the court, other members of the profession and the public." The *Professional Conduct Handbook of the Law Society of Upper Canada* sets out exactly the same rule. Integrity, simply stated, is the standard by which a lawyer's conduct must be judged.

Chapter Eight of the CBA Code establishes guiding ethical principles for the lawyer acting as an advocate. He or she must, the rule states, "treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law." Commentary to this chapter elaborates on the principle. Lawyers should not "knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, *suppressing what ought to be disclosed* or otherwise assisting in any fraud, crime or illegal conduct" (emphasis added). The commentary to Chapter Eight further provides that a lawyer must not dissuade a material witness from giving evidence or advise such witness not to appear at a hearing. Identical guidelines can be found in the guidelines for a number of provincial jurisdictions.[34]

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[34] See rule 10 of the *Professional Conduct Handbook of the Law Society of Upper Canada*, Article 44 of the *Code of Professional Ethics of the Bar of the Province of Quebec* and Rule c-12 of the *Professional Conduct Handbook of the Barristers Society of New Brunswick*

In addition to the general duty to act with integrity and the more particular duty not to suppress evidence or dissuade relevant witnesses from appearing in proceedings, Crown counsel have a special duty under the CBA Code. Their duty is not to seek a conviction, but to see that justice is done through a fair trial upon the merits. According to Chapter Eight (Commentary Seven):

The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence.

Taken together these guidelines impose on all counsel both general and particular obligations. The general obligation to act with integrity is supplemented by an additional obligation of advocates to make all authorities, evidence and witnesses available to the tribunal. Moreover, Crown counsel are, under both the CBA Code and the *Law Society of Upper Canada Professional Conduct Handbook*, positively obligated to bring to the attention of an accused all evidence, whether favourable to the accused or not. There are no exceptions to this obligation. It is clear. It is complete. It imposes a duty on Crown counsel to see that justice is done, not that accused persons are convicted. Arguably, this duty is the highest calling of a prosecutor in Canadian courts. When acting in the capacity of Crown counsel, lawyers must make full disclosure of documents, statements and other evidence to defence counsel before the trial, during the trial and after the trial. Failure to do so cannot be seen as anything other than a failure to adhere to the minimum ethical standards adopted by the Barristers Society of Nova Scotia and numerous other jurisdictions in Canada.

(b) In the United States

The first formal code of legal ethics in the United States dates from 1887 when Judge Thomas Goode Jones drafted the Alabama Code of Legal Ethics. This code served as a model for the American Bar Association's *Canons of Professional Ethics*, which was adopted in 1908. In 1969 the Canons were superceded by the American Bar Association's *Model Code of Professional Responsibility*, which differed from the Canons in two important respects: first, in format; and second, in language. The format was changed with the new Model Code organized in three parts: (i) Canons; (ii) Ethical Considerations; and (iii) Disciplinary Rules. The language was changed to eliminate the hortatory "should" and replaced it with the mandatory "shall", insofar as the Disciplinary Rules were concerned.[35]

Promulgation by the American Bar Association of the *Model Code of Professional Responsibility* did not, of course, result in its immediate adoption in American courts. To become operative within a State, a code of professional responsibility must be adopted by the State, usually by the Supreme Court of that State, or alternatively by the local bar association, which in most American States exercises a role synonymous with Canadian provincial law societies. The Model Code was adopted in every American State except for Illinois, which prepared and adopted its own code. A number of States, as part of the adoption process, modified and have subsequently amended the ABA Code. Similarly, the ABA has, from time to time, amended the Code although these amendments have not been implemented by some States. Generally, however, the differences between States are few. Adoption by a State of the ABA Model Code does not apply to federal courts operating within that State. Those courts are separate from State courts and must, in and of themselves, adopt the ABA Model Code. Some have and others have not, although it is fair to say that the Model Code is persuasive authority even if not adopted by a particular federal court.

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[35] This section of the report was derived from L. Ray Patterson, *Legal Ethics: The Law of Professional Responsibility*, (New York: Matthew Bender, 1984) pp. 5-6

In 1977, an ABA Commission was asked to review the Model Code. In 1983 the ABA adopted a new document, the *Model Rules of Professional Conduct* (see Appendix F). These rules, like the Model Code, must be adopted by each State and every federal court in order to come into effect and, in general, have not yet been so adopted. Accordingly, the Model Code remains the primary source of ethical principles for the practice of law in the United States.

The Model Code sets out the basic ethical standards of a prosecutor as follows:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the Sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defence of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused. (EC 7-13)

Not only is the duty of the prosecutor to disclose exculpatory evidence made plain in the ethical considerations of the American Bar Association Model Code, it is also elevated to the standards of a disciplinary rule: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." (DR 7-103)[36] (see Appendix G)

Under the new *Model Rules of Professional Conduct* the role of the prosecutor is further defined and the changes that have been made reflect the judicial developments on point. The relevant provision of the Model Text Rule provides: "The prosecutor in a criminal case shall: (d) make timely disclosure to the defence of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offence, and, in connection with sentencing, disclosure to the defence and to the tribunal all unprivileged information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." (Rule 3.8)[37]

In summary, insofar as American ethical guidelines for the disclosure of exculpatory evidence are concerned, there is a duty and that duty is virtually unfettered. Considered alongside the requirements of American constitutional law, it is fair to say that where exculpatory evidence exists, it must be brought in some meaningful way to the attention of counsel for the accused or the accused if unrepresented. Failure to disclose such evidence not only raises serious constitutional issues, it also potentially gives rise to violations of the ethical standards adopted by the American States.

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[36] The *ABA Standards for Criminal Justice* (2nd ed. 1980) provide for full file disclosure, stating in part: "(a) Upon request of the defence, the prosecuting attorney shall disclose to defence counsel all the material and information within the prosecutor's possession or control...." This general mandate is restricted by the number of narrow exceptions, including where the prosecutor believes that disclosure raises a substantial risk of physical harm, intimidation or bribery, which outweighs the benefits of disclosure to counsel for the defence. These standards do not, however, carry the weight of the Model Code, nor are they, apparently, binding in any state. For relevant text of the *ABA Standards for Criminal Justice* see Appendix G.

[37] The commentary to the rule notes that : "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt be decided upon the basis of sufficient evidence...."

(c) In the United Kingdom

There are two separate sources of ethical standards for the practice of law in the United Kingdom. The Law Society produces a loose-leaf handbook entitled *Professional Conduct for Solicitors*. This handbook is amended and added to from time to time as new issues arise. The Senate of the Inns of Court, the professional body for British barristers, has also turned its attention to the formulation of ethical guidelines of the practice of law and makes available the *Code of Conduct for the Bar of England and Wales*. This Code was approved by the bar in a General Meeting on 15 July 1980 and it applies to all British barristers.

As a general matter the Code provides, *inter alia*, that it is the duty of every barrister: "(b) not to engage in conduct (whether in pursuit of his/her profession or otherwise) which is dishonest and which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice."[38] Moreover, it is also part of the general obligations of British barristers to observe the ethics and etiquette of the profession. Violation of either of these obligations, or of any of the specific obligations then set out in the code, constitute professional misconduct and are the proper subject of discipline.

The general obligations of the British barrister are similar in substance to the general obligations of Canadian lawyers found in the *Canadian Bar Association Code of Professional Conduct* and in the various law society codes: they require the barrister to act with integrity. And just as the Canadian equivalents codify the professional obligations of Crown counsel, so too does the British Code.

This Code of Conduct provides that: "It is not the duty of Prosecuting Counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and to see that the jury are properly instructed in the law applicable to those facts."[39] Insofar as the duty of the Crown to disclose exculpatory evidence is concerned, the Code requires that it be disclosed: "Where Prosecuting Counsel has in his possession statements from persons whom he does not propose to call as witnesses, he should regard it as normal practice to show such statements to the Defence. Where, however, the Defence already know of the existence, identity and whereabouts of any such person and are in a position to call him (as, for example, when a notice of alibi has been served, or when such person is married to a Defendant) and in other exceptional circumstances, the Prosecuting Counsel may, in his discretion, refrain from showing the statement to the Defence."[40]

In summary, therefore, the British Code requires that Crown counsel disclose exculpatory evidence to lawyers for the accused. When considered alongside the guidelines on point, there appears to be an almost absolute professional and legal obligation in Great Britain to disclose exculpatory evidence to the accused.

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38. Section 6(b)

39. Section 159

40. Section 160

Chapter 6
Summary and Conclusions

A. Summary

Were the Crown disclosure problems in the Marshall case a rarity or were they symptomatic of a general reluctance of the State to provide more information to the accused? Clearly the latter is the case. The issue of State disclosure to the accused, balanced against the accused's right to make full answer and defence, goes beyond Canadian borders.

There are numerous examples of famous cases where non-disclosure has led to grave miscarriages of justice and wrongful convictions. In the United States the classic non-disclosure case is *Brady* v. *Maryland* (supra). In this case a prosecutor intentionally withheld a statement from the accused murder's counsel where a third party had admitted committing the same murder. In the Australian case, *Re Van Beelen* (1974), 9 S.A.S.R. 163, a man was convicted of murder after two appeals on disclosure arguments. The Crown had failed to disclose a third party statement confessing to a murder with four independent witnesses supporting the guilt of the confessed person. Yet, the highest Court of Appeal in Australia stated that the Crown had no obligation to disclose those statements. They took this view because the police and the Crown were of the opinion that their statements were not believable and, therefore, should not be provided to the defence. This case highlights why Crown discretion in disclosure is unacceptable.

Another infamous Australian decision, *Lawless* v. *The Queen* (1979), 53 A.L.J.R. 733, has an uncanny resemblance to the Donald Marshall case. Peter Lawless was convicted of murder and it was later determined that various pieces of critical exculpatory evidence were suppressed by the Crown, including a key eyewitness statement fully supporting Mr. Lawless' alibi. The prosecution also failed to disclose, at the first trial, the fact that the principal Crown witness had spent several weeks under institutional psychiatric care. Unfortunately, Lawless' appeals were rejected. The Court reiterated the principle that there is no requirement of Crown disclosure. Mr. Lawless, after being convicted, was finally pardoned several years later by the Australian Government.

From these various experiences there emerge at least six fundamental guiding principles that must be adopted to ensure fairness and justice in Crown disclosure.

B. Conclusions

1. The requirement to disclose information to the defence must apply to both the Crown prosecutor and the investigating police agency.

2. The Crown prosecutor and the police have a "positive duty" to make full disclosure to the accused.

3. The Crown prosecutor and the police must not limit their disclosure to that evidence or information which in their opinion is relevant and credible.

4. Disclosure to an accused must be "continuing duty" even after the appeal periods have expired.

5. Any decision not to make full disclosure to the defence must be made by a Judge upon an *inter partes* application by the Crown prosecutor, and not left to the discretion of a Crown prosecutor or the police.

6. Mandatory disclosure shall be enforced through the adoption and implementation of sanctions by:
(a) amending the *Criminal Code* to establish a Crown disclosure procedure; and
(b) amending the legal profession's codes of ethics to incorporate more specific ethical guidelines regarding Crown disclosure.

Chapter 7
Recommendations

1. The Canadian Bar Association should strike a National Committee to review the *Code of Professional Conduct* to implement specific ethical guidelines for Crown disclosure.

2. The Canadian Bar Association should strike a National Committee to establish a supplementary special code of professional conduct for those practicing criminal law to be known as the *Canadian Bar Association Standards for Criminal Justice*.

3. The Federal Government should implement amendments to the *Criminal Code* of Canada[41] as follows:

Part XVIII.2 Disclosure

534.1 A justice shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself
(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution; and
(b) that the accused has been advised of his right to request disclosure under Section 534.2.

534.2 (1) Upon request to the prosecutor, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter,
(a) to receive a copy of his criminal record;
(b) to receive a copy of any statement made by him to a person in authority and recorded in writing (or to inspect such a statement if it has been recorded by electronic means);
(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;
(d) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;
(e) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;
(f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and
(g) to receive, where known to the investigating police agency and/or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified, unless upon an *inter partes* application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a Justice having jurisdiction in the matter orders, in writing and with reasons, that disclosure be delayed until a time fixed in the order.

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[41] As adapted from the Law Reform Commission of Canada's Recommendations in its 1982 report, *Disclosure by Prosecutors*

(2) A request under subsection (1) imposes a continuing obligation on the prosecutor and police agency to disclose the items within the class requested, without need for a further request.

(3) A statement referred to in paragraph (b), (d) or (e) of subsection (1) does not include a communication that is governed by Part VI.1 of this Act.

534.3 Where a "justice" having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of Section 534.2, he shall, at the accused's request, adjourn the proceedings until in his opinion there has been compliance, and he may make such other order as he considers appropriate in the circumstances.

All of which is respectfully submitted

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